(2)

Supreme Court, U.S.
FILED
JUN 3 1996
CLERK

No. 95-1961

IN THE SUPREME COURT OF THE UNITED STATES

October Term: 1995

CORRECTED COPY

GEORGE E. HOPKINS, JR.
Petitioner

v.

BALTIMORE GAS AND ELECTRIC COMPANY
Respondent

On Petition for Writ of Certiorari
to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Lee David Hoshall
2601 Madison Avenue #1205
Baltimore, Maryland 21217
(410) 669-4434

Attorney for Petitioner
George E. Hopkins, Jr.

82 pp

QUESTIONS FOR REVIEW

1. Whether, in a "hostile environment" sexual harassment claim brought under Title VII of the Civil Rights Act of 1964, the "totality of circumstances" includes psychological harm and discriminatory harassment of both a sexual and non-sexual nature?

2. Whether a supervisor's sexual harassment of an employee of the same gender is actionable under Title VII of the Civil Rights Act of 1964?

TABLE OF CONTENTS

QUESTIONS FOR REVIEW i

TABLE OF AUTHORITIES iii

CITATIONS OF REPORTS OF OPINIONS AND ORDERS 1

STATEMENT OF JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 2

ARGUMENT 8

I. THE FOURTH CIRCUIT ERRED IN CONFINING ITS "HOSTILE ENVIRONMENT" ANALYSIS TO THE SUPERVISOR'S SEXUAL CONDUCT AND IN EXCLUDING THE PSYCHOLOGICAL HARM TO PETITIONER HOPKINS 8

II. THE ACTIONABILITY OF "SAME-GENDER" SEXUAL HARASSMENT UNDER TITLE VII IS AN IMPORTANT THRESHOLD ISSUE THAT SHOULD BE DECIDED BY THE COURT . 12

CONCLUSION 15

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Andrews v. City of Philadelphia,
895 F.2d 1469 (3rd Cir. 1990) 10

Ashworth v. Roundup Co.,
897 F.Supp. 489 (W.D. Wash. 1995). 13

Barnes v. Costle,
561 F.2d 983 (D.C. Cir. 1977). 12

Baskerville v. Culligan Int'l Co.,
50 F.3d 428 (7th Cir. 1995). 13

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994) 11

Bell v. Crackin' Good Bakers, Inc., 777 F.2d 1497 (11th Cir. 1985) 10

Benekritis v. Johnson,
882 F.Supp. 521 (D.S.C. 1995). 13

Burns v. McGregor Elec. Indus.,
955 F.2d 559, 564 (8th Cir. 1992) 9

Easton v. Crossland Mortgage Corp.,
905 F.Supp. 1368 (C.D.Cal. 1995). 14

Ecklund v. Fuisz Technology Ltd.,
905 F.Supp. 335 (E.D.Va., Nov. 7, 1995). 14

EEOC v. Walden Book Co. Inc.,
885 F.Supp. 1100 (M.D. Tenn. 1995). 14

Garcia v. Elf Atochem North America,
28 F.3d 446 (5th Cir. 1994) 12, 14

Giddens v. Shell Oil Co.,
No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)). . . . 12

Goluszek v. Smith,
697 F.Supp. 1452 (N.D. Ill. 1988). 14

Griffith v. Keyston Steel & Wire,
887 F.Supp. 1133 (C.D.Ill. 1995). 14

Hall v. Gus Constr. Co.,
842 F.2d 1406 (8th Cir. 1988) 10

Harris v. Forklift Systems, Inc.,
__ U.S. __, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) . . . 8, 9, 10, 11

Hicks v. Gates Rubber Co.,
833 F.2d 1406 (10th Cir. 1987) 10

Hopkins v. Baltimore Gas & Electric Co.,
77 F.3d 745 (4th Cir. 1996) . . . . . passim

Hopkins v. Baltimore Gas & Electric Co.,
871 F.Supp. 822 (D.Md. 1994) . . . . . passim

Joyner v. AAA Cooper Transp.,
597 F.Supp. 537 (M.D.Ala. 1983),
aff'd without opinion, 749 F.2d 732 (11th Cir.1984). . . . 14

King v. Hillen,
21 F.3d 1572 (Fed.Cir. 1994) 10

King v. M.R. Brown Inc.,
911 F.Supp. 161 (E.D.Pa. 1995) 14

Los Angeles Dept. of Water & Power v. Manhart,
435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) . . . 9

Mayo v. Kiwest Corp.,
898 F.Supp. 335 (E.D.Va.1995) 13

McCoy v. Johnson Controls World Serv. Inc.,
878 F.Supp. 229 (N.D.Ga. 1995). 14

McWilliams v. Fairfax County Bd. of Supervisors,
No. 94-1607, __F.3d __ (4th Cir. 1996). 10

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57, 106 S.Ct.2399, 91 L.Ed.2d 49 (1986) 9, 15

Myers v. City of El Paso,
874 F.Supp. 1546 (W.D.Tex. 1995). 13

Oncale v. Sundowner Offshore Servs.,
No. 95-30510, 1996 *U.S.* App. LEXIS 11479
(May 20, 1996). 12

Pittman v. Correctional Healthcare,
868 F.Supp. 105 (E.D.Pa. 1994) 10

Prescott v. Indep. Life & Acc. Insur. Co.,
878 F.Supp. 1545 (M.D.Ala. 1995). 14

Pritchett v. Sizeler Real Estate MGMT.,
67 Fair Emp. Prac. Dec.(BNA) 1377 (E.D.La. 1994),
aff'd without opinion, 44 F.3d 1004 (5th Cir. 1995). . . . 14

Raney v. District of Columbia,
892 F.Supp. 283 (D.D.C. 1995) 14

Rogers v. Equal Employment Opportunity Com'n,
454 F.2d 234 (5th Cir. 1971) 9

Sardinia v. Dellwood Foods Inc.,
F.Supp.__ (S.D.N.Y. 1995). 14

Saulpaugh v. Monroe Community Hosp.,
4 F.3d 134, (2d Cir. 1993) cert. denied,
U.S. __, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994) 12

Tanner v. Prima Donna Resorts. Inc.,
919 F.Supp. 351 (D.Nev., Jan. 23, 1996). 14

Tietgen v. Brown's Westminster Motors Inc.,
C.A. No. 95-1025-A, 1996 U.S. Dist. LEXIS 5225,
70 Fair Emp. Prac. Dec. (BNA) 1020
(E.D.Va., April 18, 1996). 14

Vandeventer v. Wabash Nat. Corp.,
867 F.Supp. (N.D.Ind.1994). 13

Williams v. District of Columbia,
916 F.Supp. 1 (D.D.C., Feb. 5, 1996). 14

Wright v. Methodist Youth Services Inc.,
511 F.Supp. 307 (N.D.Ill. 1981) 14

Statutes and Rules

Title VII of the Civil Rights Act of 1964. . . . . passim

28 U.S.C. sec. 1254 (1). 2

28 U.S.C. sec. 1331 3

42 U.S.C. sec. 2000e-2(a)(1). 2, 9

42 U.S.C. sec. 2000e-5(f). 3

E.E.O.C. *Compliance Manual* (1987), sec. 615.2. . . . . 2, 15

CITATIONS
OF
REPORTS OF OPINIONS AND ORDERS

1. *Hopkins v. Baltimore Gas & Electric Company*, 871 F.Supp. 822 (D.Md., Dec. 28, 1994)

2. *Hopkins v. Baltimore Gas & Electric Company*, 77 F.3d 745 (4th Cir., Mar. 5, 1996)

3. *Hopkins v. Baltimore Gas & Electric Company*, No. 95-1209, CA-93-4167-H (4th Cir., Mar. 25, 1996) (denying petition for rehearing and suggestion for rehearing *in banc* as untimely filed)

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the District of Maryland was entered on December 28, 1994. The United States Court of Appeals for the Fourth Circuit affirmed the judgment below on March 5, 1996.

The Court of Appeals denied Hopkins' petition for rehearing and suggestion for rehearing *in banc* as untimely filed on March 25, 1996.

This Honorable Court's jurisdiction to review on a Writ of Certiorari the Fourth Circuit's decision is stated in 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The federal statute involved in the case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a).

The regulations of the United States Equal Employment Opportunity Commission ("EEOC") involved in the case are 29 C.F.R. Section 1604.11, entitled "Sexual harassment," and the *EEOC Compliance Manual*, Section 615.2(b)(3) (1987).

STATEMENT OF THE CASE

On March 5, 1996, the Fourth Circuit affirmed the judgment of the district court of Maryland, which had granted summary judgment in favor of Baltimore Gas & Electric Company ("BG&E"), in George E. Hopkins, Jr.'s ("Hopkins") action brought under Title VII of the Civil Rights Act of 1964. The

district court's jurisdiction had been properly invoked under 28 U.S.C. Section 1331 and 42 U.S.C. Section 2000e-5(f).

On or about December 23, 1993, Hopkins filed the Title VII action against BG&E in the district court, alleging that his male supervisor at BG&E sexually harassed him and that his employment was terminated "based on sex and retaliation." *Hopkins v. Baltimore Gas & Electric. Co.*, 871 F.Supp. 822, 823 (D.Md. 1994).

On December 28, 1994, the district court (Senior Judge Alexander Harvey, II) granted BG&E's motion for summary judgment on both of Hopkins' Title VII claims. (Opinion reproduced in Appendix). In its opinion, the court held that Hopkins failed to state a claim because "Title VII does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender." App. at 50. Moreover, the court found that Hopkins had failed to show that the harassment occurred "'because of' his sex." App. at 51-52. The court also held that he failed to establish a *prima facie* case of retaliation, because BG&E's alleged actions were not "adverse employment actions." App. at 54.

Hopkins filed a timely appeal to the Fourth Circuit. On March 5, 1996, the appellate court issued a published opinion affirming the judgment of the district court. *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745 (4th Cir. 1996). Without resolving the question of whether "same-gender sexual harassment" is actionable under Title VII, the court held that Hopkins failed to establish a *prima facie* case of sexual harassment because "as a matter of law the conduct of which Hopkins complains . . . does not create a sufficiently hostile environment on which to rest a Title VII claim." App. at 21.

Judge Niemeyer, who wrote the court's opinion, also wrote separately on the issue of "same-gender sexual harassment." He concluded that "sexual harassment of a male employee, whether by a male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man." App. at 16.

The court agreed with the district court that Hopkins failed to establish a *prima facie* case of unlawful retaliation because he "failed to show that BG&E had taken any adverse employment action against him." App. at 21-22.

In its opinion, the Fourth Circuit cited numerous instances of sexually offensive and provocative conduct on the part of Hopkins' supervisor, Ira Swadow, that was directed at or in the presence of Hopkins at work. App. at 4-7. This conduct, the appellate court held, was "not sufficiently severe or pervasive to bring it within Title VII's purview" because it was "temporally diffuse, ambiguous, and often not directed specifically at [Hopkins]." App. at 19.

While the court minimized the severity and pervasiveness of Swadow's sexual-oriented conduct, it ignored numerous other facts, many of them undisputed, and most of them cited by the district court in its opinion, showing repeated acts of harassment, threats, and other adverse actions that occurred during the same period and after Hopkins repeatedly complained to BG&E management about his supervisor's conduct.

The district court in its opinion (see Appendix) found that Hopkins repeatedly complained to BG&E management about his supervisor's conduct. Beginning in 1987, he also underwent psychotherapy and psychiatric treatment to deal with the problems he was experiencing. He saw a therapist several times to discuss "techniques I might use to avoid these kinds of [sexual] advances

without creating any additional difficulties." Fourth Circuit *Joint Appendix* (hereinafter, "R at ...") at 110-111, 219-221. He also saw a psychiatrist and two different therapists in 1991 and 1992 for treatment related to Swadow's harassment. He was diagnosed with "severe depression" in 1991 and treated with prescription medication. R. at 222-225.

In late 1989, Hopkins complained directly to Swadow's boss and to BG&E's grievance coordinator, about Swadow's "inappropriate [and] sexual comments and behavior" toward him. App. at 31. About the same time, when Hopkins gave Swadow his education contract to sign, Swadow pressed his thumb down on the table and said, "It won't do you any good, I'm going to keep you right here and make your life miserable." R. at 114-115.

By early April of 1990, "the harassment had resumed" and Swadow had begun to scrutinize Hopkins' work "more closely" and to push him "to do overtime." DC at 826. Hopkins again complained to Swadow's superiors several times during April, 1990. *Id.* At the last meeting, Johannson suggested that he "look for employment outside the company." R. at 130-132.

Hopkins then complained about the harassment to Johannson's superior, in April 1990. In advance of a planned meeting, Hopkins prepared a seven-page "Unit Situation Report" that described, among other things, several "alleged incidents of sexual harassment" by Swadow. App. at 32-33. Right before the meeting, Swadow presented Hopkins with a performance appraisal that contained several "needs to improve" ratings and an "unsatisfactory" rating in "work relations." App. at 32.

When Hopkins refused to sign the appraisal, Swadow responded that there was "nothing [Hopkins] could do about any of this because [Swadow] had friends in high places." R. at 113. Hopkins believed that Swadow's negative comments in the

appraisal and his other comments and actions "were as a result of my having objected to his advances." R. at 113-114.

At a follow-up to the meeting with Anton Endler (BG&E's manager of employee services), Endler told Hopkins that if he "continued to pursue this matter he could end up losing his job and that he should just 'forget it' and get on with his life." App. at 34.

Several weeks later, Hopkins filed another grievance and met with several BG&E officials, who decided that "no further action would be taken by the Company in that regard." App. at 36-37. Afterward, Swadow "threatened Hopkins by telling him that he was mistaken if he thought it was over between them." App. at 38.

In May, 1991, Swadow accused Hopkins of improperly substituting a color reprint for an original. Hopkins denied the accusation, but on June 10, 1991, was presented (by Swadow) with a "formal" disciplinary warning accusing him of dishonesty. App. at 36. Swadow said to Hopkins: "This is about something that I'm sure you thought was over." R. at 238.[1]

On June 12, 1991, Hopkins next met with BG&E's vice president for corporate affairs, and was told that the matter was "closed." App. at 37. Soon afterward, Swadow advised Hopkins that he "wanted to inspect [Hopkins'] work at the end of each day" and that Hopkins "would no longer be permitted to do personal work in the darkroom." *Id.* However, it was a normal practice for employees of BG&E's photographic unit to use the facilities for this purpose. R. at 147-149.

---

[1] The disciplinary "warning" was later removed from Hopkins's personnel file in 1992 after he filed the charge of discrimination with EEOC. App. at 37 n.11. Paul Edwards told Hopkins that he removed it because "it was not justified to begin with." R. at 145-46.

The following morning, Hopkins was escorted by Swadow and Johannson to a psychological "Fitness for Duty." App. at 36; R. at 507-508. Hopkins was interviewed by a psychologist, who rejected his claim of "retaliation" and asked him a series of "embarrassing" personal questions. R. at 146, 149, 155, 240.[2] Afterward, Hopkins was told to go back to the waiting room and "not to leave . . . for security reasons." R. at 146, 149, 155-57, 241.

BG&E seldom gave employees "Fitness For Duty" evaluations, and when it did, it was usually for drug testing. R. at 307, 322-324.[3]

During January and February, 1992, Swadow required Hopkins "to perform strenuous physical activities and to work overtime despite medical restrictions relating to surgery which plaintiff had undergone in late 1991." App. at 39. The heavy lifting caused Hopkins "considerable pain" and made it difficult for him to use his arm. R. at 159-166, 243-244, 261.

In July and August of 1992, BG&E distributed a "Human Relations Report" among its top managers that falsely stated that Hopkins made his allegations of sexual harassment "after being disciplined about his performance in 1989." R. at 294, 385, 409-412.

On February 25, 1993, Hopkins met with BG&E's newly appointed top executive to apprise him of what had been happening. Shortly after the meeting, Edwards informed Hopkins that he would not be permitted to attend an advanced computer

---

[2] The questions included his ability to perform sexually (impotence), whether he had problems with his bowels, or had any memory loss, or was taking any drugs, and whether he owned any weapons. R. at 155, 240.

[3] Johannson's testimony created a dispute as to whether Swadow was also given a psychological evaluation, contrary to the courts' conclusion. App. at 22, 36.

seminar for which he had previously received approval. App. at 39; R. at 176-78, 216-17.

On July 13, 1993, Hopkins reported to management that Swadow had made a threat of suicide or harm to others in his presence at work. Hopkins was then called into a meeting with Edwards, who stated that his actions in raising the issues were a "performance problem" and if it continued, "you will be discharged." R. at 183-84, 187-194, 200.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN CONFINING ITS "HOSTILE ENVIRONMENT" ANALYSIS TO THE SUPERVISOR'S SEXUAL CONDUCT AND IN EXCLUDING THE PSYCHOLOGICAL HARM TO PETITIONER HOPKINS

Hopkins' Petition for Writ of Certiorari should be granted for the reason that the Fourth Circuit erred as a matter of law in confining its analysis of his "hostile environment" claim of sexual harassment to the supervisor's sexual conduct, and in totally excluding, from the analysis, other acts of harassment, disparate treatment, and the undisputed psychological harm to Hopkins. The court's analysis is in conflict with this Court's decision in *Harris v. Forklift Systems, Inc.*, __ U.S. __, 114 S.Ct. 367 (1993), and with the decisions of other federal courts of appeal.

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin." 42 U.S.C. sec. 2000e-2(a)(1). This language provides a cause of action for sexual harassment in the workplace, whether or not there is "economic" or "tangible loss." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). As this Court explained in the *Meritor* decision, Section 2000e-2(a) "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64, quoting *Los Angeles Dept. of Water and Power v. Manhart*, 98 S.Ct. 1370, 435 U.S. 702, 98 S.Ct. 1370, 1374 (1978).

For sexual harassment to be actionable, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor, supra*, 106 S.Ct. at 2405, *quoting Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971). In *Harris v. Forklift Systems, Inc., supra*, this Court reaffirmed this standard, explaining that Title VII "comes into play before the harassing conduct leads to a nervous breakdown." 114 S.Ct. at 370. Whether an environment is hostile or abusive "can be determined only by looking at *all the circumstances*." *Id* at 371. (emphasis added).

These circumstances may include, but are not limited to, the harassing conduct's frequency and severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. 114 S.Ct at 370-71. The conduct's "effect on the employee's psychological well-being" is also a "relevant factor" that may be taken into account. *Id.*

In its opinion, the Fourth Circuit clearly did not examine "the totality of the circumstances" as required by this Court. It did not consider the cumulative effect of the incidents on Hopkins' work environment, where the cumulative effect "may exceed the sum of the individual episodes." *Burns v. McGregor Elec. Indus.*, 955

F.2d 559, 564 (8th Cir. 1992); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

Swadow's sexual innuendo and other offensive sexual conduct were "frequent" enough to be offensive, and were both "severe" and "humiliating" to Hopkins. It is undisputed that Hopkins suffered serious harm to his "psychological well-being" as a result of the offensive conduct. Nevertheless, this important factor, which was presented to both the district court and the court of appeals, played no part whatsoever in the Fourth Circuit's objective or subjective analysis of the environment.

The Court further departed from *Harris* and other federal decisions by confining its analysis of Hopkins' work environment to supervisor Swadow's sexually-oriented conduct and innuendo, without considering the other harassing conduct and disparate treatment. As *Harris* strongly suggests, a workplace "permeated with 'discriminatory intimidation, ridicule, and insult'" may violate Title VII whether or not the harassing conduct itself is sexual in nature. Other courts of appeals have so held.[4]

---

[4] *See King v. Hillen*, 21 F.3d 1572, 1583 (Fed.Cir. 1994); *Bell v. Crackin' Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985) ("Sexual harassment can be . . . threatening, bellicose, demeaning, hostile or offensive conduct by a supervisor in the workplace because of the sex of the victim of the conduct."); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (on remand, court should consider acts "clearly sexual in nature" as well as non-sexual "threats of physical violence" and "incidents of verbal abuse"); *Andrews v. City of Philadelphia, supra*, 895 F.2d at 1486 (on remand, court should consider the "evidence in its totality," not only seuxal-oriented conduct, but "the recurrent disappearance of plaintiff's case files and work product, anonymous phone calls, and destruction of other property."); *Pittman v. Correctional Healthcare*, 868 F.Supp. 105, 108-109 (E.D. Pa. 1994) (tendency of supervisor's sexist remarks "to cross into harassment. . . is magnified by plaintiff's allegation that. . . she was denied benefits and raises.") In *McWilliams v. Fairfax County Bd. of Supervisors*, No. 94-1607, __F.3d __ (4th Cir. 1996), the Fourth Circuit held that sexual harassment involving heterosexual

In *Beardsley v. Webb*, 30 F.3d 524 (4th Cir. 1994), a different panel of the same appellate court made it clear that the Title VII analysis of sexual harassment must include other forms of harassment and disparate treatment. It affirmed the jury verdict in favor of a female deputy sheriff whose supervisor's "sexual innuendoes and proposals *together with his other discriminatory conduct* were sufficiently severe and pervasive to make out a sexual harassment claim." 30 F.3d at 529, citing *Harris*, 114 S.Ct. at 370. (emphasis added). Cited as important was the fact that the supervisor's conduct "caused her to suffer severe depression requiring professional treatment." *Id.*

Likewise, in this case, the court had before it substantial evidence of other harassment and disparate treatment suffered by Hopkins, including psychological harm, implicit threats of job termination, Swadow's vindictive statements, his overscrutiny of Hopkins' work, unfair discipline and critical work evaluations, BG&E's circulation of a report impugning Hopkins' motives for complaining, Swadow's refusal to adhere to his doctor's medical restrictions, the withdrawal of certain job-related privileges, and finally, the requirement that Hopkins to undergo a psychological "fitness for duty."

Clearly, these acts were sufficient to make Hopkins' life miserable at work, and to interfere with his job performance. *Harris*, *supra*, 114 S.Ct. at 371, 372. The Writ of Certiorari should be issued for review of this question.

---

males is not actionable under Title VII. The Court expressly declined to decide whether harassment by a homosexual or bisexual supervisor is actionable.

II

WHETHER "SAME-GENDER" SEXUAL HARASSMENT IS ACTIONABLE UNDER TITLE VII IS AN IMPORTANT THRESHOLD ISSUE THAT SHOULD BE DECIDED BY THE COURT

This petition should also be granted for the reason that the issue of "same-gender" sexual harassment is an important Title VII issue that requires this Court's review. Federal courts are deeply divided over this issue, and there are numerous cases pending before federal trial courts that raise the same issue.

As noted above, the question of whether a supervisor's sexual harassment of an employee of the same gender is actionable under Title VII was resolved in the negative by the district court but was not conclusively resolved by the Fourth Circuit panel.

Only one court of appeals has expressly decided the issue. In *Garcia v. Elf Atochem North America*, 28 F.3d 446, 45152 (1994), the Fifth Circuit stated, with little discussion, that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *(Quoting Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993) (unpublished)). The court's decision was recently reaffirmed by the Fifth Circuit as binding precedent. *Oncale v. Sundowner Offshore Servs.*, No. 9530510, 1996 U.S. App. LEXIS 11479 (May 20, 1996).

Several other circuit courts have taken the opposite position, but only in *dictum*. *See Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C. Cir. 1977) (Title VII claim may be actionable where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender."); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir. 1993) (Van Graafeiland, J.,

concurring) (arguing that "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), cert. denied, _ U.S. _, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (stating that "sexual harassment of men by women, or men by other men, or women by other women would also be actionable in appropriate cases.")

At the district court level, "courts across the country are deeply divided on whether Title VII applies to same-gender sexual harassment." *Hopkins, supra*, 77 F.3d at 751 (Niemeyer, J., writing separately).

A minority of such courts have held that Title VII does not apply to such claims of sexual harassment.[5] Most of these courts relied heavily upon the reasoning in *Goluszek v. Smith*, 697 F.Supp. 1452, 1456 (N.D.Ill. 1988), where the district court affirmed a grant of summary judgment against a male plaintiff who alleged sexual harassment by several male supervisors. The *Goluszek* court reasoned that Congress in enacting Title VII was concerned about "an imbalance of power" and the resulting "discrimination against a discrete and vulnerable group." *Id* at 1456. Since the plaintiff "was a male in a male-dominated environment" and the alleged harassment did not create "an anti-male environment," Title VII did not apply. *Id.*

On the other hand, a growing majority of district courts have held that "same-gender" sexual harassment is actionable under

---

[5] *See Mayo v. Kiwest Corp.*, 898 F.Supp. 335, 337 (E.D.Va.1995); *Vandeventer v. Wabash Nat. Corp.*, 867 F.Supp. 790 (N.D.Ind.1994); *Ashworth v. Roundup Co.*, 897 F.Supp. 489. 494 (W.D. Wash. 1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548 (W.D.Tex. 1995); and *Benekritis v. Johnson*, 882 F.Supp. 521, 525-26 (D.S.C. 1995)

Title VII.[6] Expressly rejecting the reasoning in *Garcia* and *Goluszek*, these courts cited several reasons for their conclusion.

First, the language of Title VII is "non-exclusive" and stated in "gender-neutral" terms. Nothing in the text indicates that Title VII's protections extend only to persons who are harassed by a member of the opposite sex. *King v. M.R. Brown, supra*, 911 F.Supp. at 161; *Williams v. District of Columbia, supra* at 7-10; *McCoy, supra* at 5-6. Courts also point out that it would be "untenable" to allow claims of "reverse discrimination" but not claims of "same-gender" sexual harassment to proceed under Title VII. *Walden Books, supra*, 885 F.Supp. at 1103; *Williams, supra* at 9; *Prescott, supra* at 1550;

Finally, the United States Equal Employment Opportunity Commission's *Compliance Manual* regarding sexual harassment provides:

---

[6] *Tietgen v. Brown's Westminster Motors Inc.*, C.A. No. 95-1025-A, 1996 U.S. Dist. LEXIS 5225, 70 Fair Emp. Prac. Dec. (BNA) 1020 (E.D.Va., April 18, 1996); *Williams v. District of Columbia*, 916 F.Supp. 1 (D.D.C., Feb. 5, 1996); *Tanner v. Prima Donna Resorts. Inc.*, 919 F.Supp. 351 (D.Nev., Jan. 23, 1996); *King v. M.R. Brown Inc.*, 911 F.Supp. 161 (E.D.Pa. 1995); *Ecklund v. Fuisz Technology Ltd., 905 F.Supp. 335 (E.D.Va., Nov. 7, 1995); Easton v. Crossland Mortgage Corp.*, 905 F.Supp. 1368,1378 (C.D.Cal. 1995); *Prescott v. Indep. Life & Acc. Insur. Co.*, 878 F.*Supp.* 1545, 1550 (M.D.Ala. 1995); *McCoy v. Johnson Controls World Serv. Inc.*, 878 F.Supp. 229, 230 (N.D.Ga. 1995); *EEOC v. Walden Book Co. Inc.*, 885 F.Supp. 1100, 1103 (M.D. Tenn. 1995); *Griffith v. Keyston Steel & Wire*, 887 F.Supp. 1133 (C.D.Ill. 1995); *Sardinia v. Dellwood Foods Inc.*, _ F.Supp. _ (S.D.N.Y. 1995); *Raney v. District of Columbia*, 892 F.Supp. 283 (D.D.C. 1995); *Pritchett v. Sizeler Real Estate MGMT.*, 67 Fair Emp. Prac. Dec.(BNA) 1377, 1379 (E.D.La. 1994), aff'd without opinion, 44 F.3d 1004 (5th Cir. 1995); *Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537 (M.D.Ala. 1983), aff'd without opinion, 749 F.2d 732 (11th Cir.1984); *Wright v. Methodist Youth Services Inc.*, 511 F.Supp. 307, 310 (N.D.Ill. 1981)

The victim [of harassment] does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat employees of the opposite sex the same way.

EEOC Compliance Manual, Section 615.2(b)(3) (1987).

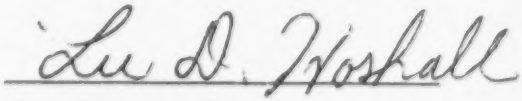
The EEOC's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, *supra*, 477 U.S. at 65.

In view of the importance of "same-gender" sexual harassment as a federal question, and the conflicting authority on this issue, this Court should provide a definitive answer.

CONCLUSION

For the above reasons, Hopkins respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



Lee David Hoshall
2601 Madison Avenue #1205
Baltimore, Maryland 21217
(410) 669-4534

Attorney for Petitioner
George E. Hopkins, Jr.

APPENDIX
OF
OPINIONS, STATUTES AND RULES

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

GEORGE E. HOPKINS, JR.,
Plaintiff Appellant,

v.

BALTIMORE GAS AND ELECTRIC COMPANY,
Defendant Appellee.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, INC.; WOMEN'S LEGAL DEFENSE FUND; NATIONAL WOMEN'S LAW CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amici Curiae.

No. 95-1209

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Alexander Harvey, II, Senior District Judge.
(CA-93-4167-H)

Argued: September 28, 1995

Decided: March 5, 1996

Before WILKINSON, Chief Judge, and NIEMEYER and HAMILTON, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion for the court only in parts I, III, and IV and wrote separately in part II. Chief Judge Wilkinson and Judge Hamilton join in parts I, III, and IV of the opinion. Chief Judge Wilkinson wrote a concurring opinion in which Judge Hamilton joins.

COUNSEL

ARGUED: Lee David Hoshall, Baltimore, Maryland, for Appellant. Mary Lee Clark, Office of the General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae EEOC. Sara Louise Mandelbaum, Women's Rights Project, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Amici Curiae Women's Rights Project, et al. Joseph Michael McGuire, SHAWE & ROSENTHAL, Baltimore, Maryland, for Appellee. **ON BRIEF:** John P. Rowe, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Carolyn L. Wheeler, Assistant General Counsel, Office of the General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae EEOC. Susan Goering, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND, Baltimore, Maryland, for Amici Curiae Women's Rights Project, et al. Robert H. Ingle, III, SHAWE & ROSENTHAL, Baltimore, Maryland; L. Ellis Justis, Jr., BALTIMORE GAS & ELECTRIC COMPANY, Baltimore, Maryland, for Appellee.

OPINION

NIEMEYER, Circuit Judge, writing for the court only in parts I, III, and IV:

George E. Hopkins, Jr., alleges in his complaint in this case that his male supervisor's comments and actions created a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964. In granting the motion for summary judgment of Hopkins' employer, the district court held that Title VII does not provide a cause of action for an employee who has been subjected to sexual harassment by a supervisor of the same gender. We affirm the district court's judgment, but for the reason that Hopkins failed to make out a prima facie case of a hostile work environment.

I

From 1985 until 1993, Hopkins worked in the Photographic Services Unit of Baltimore Gas & Electric Company (BG&E) as a color photographic technician. His immediate supervisor was Ira Swadow. In October 1993, as part of a reduction in force and a company wide reorganization, BG&E eliminated the Photographic Services Unit and its 13 positions, including those held by Hopkins and Swadow.

Hopkins contends that throughout his term of employment at BG&E, Swadow subjected him to discriminatory sexual harassment, creating a hostile work environment. Hopkins bases his claim on the following incidents:

1. Swadow frequently entered the men's bathroom when Hopkins was there alone. On one occasion in 1986, while Hopkins was at the urinal, Swadow pretended to lock the door and said, "Ah, alone at last." He walked towards Hopkins, making Hopkins feel "very uncomfortable."

2. In 1987, Swadow wrote "S.W.A.K., kiss, kiss," and drew small hearts on internal mail Hopkins received from his fiancee, a BG&E employee. On another occasion, Swadow added the word "Alternative" in front of the company name "Lifestyles" on a piece of mail addressed to Hopkins.

3. In February 1988, during a party given by Hopkins, Swadow suggested to a BG&E employee that Hopkins and his fiancee were getting married because she was pregnant. Upon Hopkins' engagement, Swadow told him that he would be "counting the months" to see when the baby arrives. Before Hopkins' marriage, Swadow occasionally asked him if he had gone on dates over the weekend and whether he had sex with anyone. Swadow also mentioned repeatedly that his children called him "Daddy," that it took a special person to be called "Daddy," and that he was sure Hopkins' son would never call Hopkins "Daddy."

4. At Hopkins' wedding on June 25, 1988, Swadow was the only man who attempted to greet Hopkins in the receiving line by kissing him.

5. Sometime before 1990, while Hopkins was leaning back on a table and speaking on the telephone, Swadow pivoted an illuminated magnifying lens over Hopkins' crotch, looked through it while pushing the lens down, and asked "Where is it?"

6. Sometime before 1990, Swadow asked Hopkins, "On a scale of one to ten, how much do you like me?" Hopkins felt that the question was inappropriate. He had previously told Swadow that he objected to Swadow's "sexual overtones."

7. Sometime before 1990, Swadow bumped into Hopkins and said, "You only do that so you can touch me."

8. Sometime before 1990, during a conversation with Hopkins and a vendor about a recent airplane crash, Swadow looked at Hopkins and said that in order to survive with burning fuel on the surface of the water, Swadow would "find a dead man and cut off his penis and breathe through that." Hopkins told Swadow that he was offended by such a "sick" statement.

9. In 1989 or 1990, while Hopkins was showing the color darkroom to a supervisor's female guest, Swadow came in and asked "Are you decent?"

10. In 1991, while preparing to leave on a business trip from Hopkins' home, Swadow found an unloaded gun in the house and pointed it at Hopkins.

11. On August 1, 1991, Swadow squeezed into the one person revolving door to the darkroom with another employee. Upon exiting the door, Swadow looked at Hopkins, who was in the darkroom, and asked, "Was it as good for you as it was for me?" The other employee looked very uncomfortable. Later, Swadow attempted to force himself into the same revolving door with Hopkins. He had made physical contact with Hopkins' back before Hopkins pushed Swadow away and told him that he "objected to it" and did not want to be in the darkroom with him.

12. Throughout 1993, Swadow regularly commented on Hopkins' appearance. For example, Swadow would say, "You look nice today," "You have a really pretty shirt on," or "You look so distinguished." Once he turned over Hopkins' tie and examined it.

13. On July 2, 1993, while Swadow and Hopkins were discussing a photographic negative, Swadow, with a "very peculiar" look on his face, commented that "orientation is subjective."

Late in 1989, Hopkins complained to his supervisors about Swadow's sexual harassment, particularly his inappropriate sexual comments and jokes. He identified the events described above in paragraphs 5 and 7. In response, BG&E conducted an internal investigation, which included interviews of Hopkins, Swadow, and nine other employees in the Photographic Services Unit. A manager's report concluded that "practically all of the Sections's employees engage in joking and comments of one kind or another" but that such comments were "not offensive" and were not "intended to be so." An employee case analyst, who could not conclude that Swadow's behavior was "sexually motivated," felt that Hopkins was trying to "hang" Swadow.

The matter was then referred to higher management, which assured Hopkins that Swadow was "under close scrutiny" and that "none of this would happen in the future." At the time, Hopkins appeared satisfied with BG&E's response. Without ultimately taking a position on whether Hopkins' charges were true, BG&E offered to interview him for a transfer to two different positions in other departments. Hopkins declined the offer out of a concern that his transfer would give his coworkers the impression that he was the one at fault.

Over a year later, Hopkins filed a charge of sexual discrimination with the Equal Employment Opportunity Commission (EEOC), and the EEOC issued a right to sue letter in September 1993. Hopkins filed this action in December 1993, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964.

Following discovery, the district court granted BG&E's motion for summary judgment on both of Hopkins' claims. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994). The court concluded that same gender sexual harassment is not actionable under Title VII and, alternatively, that the harassment of which Hopkins complained did not occur "because of" Hopkins' gender. *Id.* at 83435. With respect to Hopkins' retaliation claim, the court concluded that he had failed to show any "adverse employment action." *Id.* at 83637. This appeal followed.

II

Hopkins first argues that the district court erred in holding that same-gender sexual harassment is not actionable under Title VII. In entering summary judgment for BG&E, the district court concluded that Title VII does not provide a cause of action for an employee who has been subjected to sexual harassment by a supervisor or coworker of the same gender. 871 F. Supp. at 834. The court's reasoning focused on Congress' purpose in enacting Title VII and the statute's language:

> Title VII prohibits discriminatory conduct on the basis of gender and "evinces a congressional intent `to strike at the entire spectrum of *disparate treatment of men and women*.'" Where, as here, the alleged harasser and the alleged victim are both of the same gender, the language of the statute would be strained beyond its manifest intent were the Court to hold that under these facts there has been discrimination "because of . . . sex".

Id. (alteration in original) (citations omitted).

In deciding the question of whether same-gender sexual harassment is actionable under Title VII, we begin with the applicable statutory language. Title VII prohibits "an employer"

from "discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . .sex." 42 U.S.C. § 2000e-2(a)(1). Since Title VII's enactment, the meaning of the term "sex" as used in the Act has become the subject of judicial and academic debate. Viewed in the abstract, a prohibition of discrimination based on "sex" is broad and perhaps even undefinable. Arguably, such a prohibition might be read to preclude discrimination based on human psychological and physiological characteristics or on sexual orientation. It might also be read to prohibit all workplace sexual behavior or words and deeds having sexual content. Indeed, at oral argument, Hopkins' counsel argued that dirty jokes or sexually based profanity spoken by a male supervisor to other male employees implicates the prohibitions of Title VII.

In the context of Title VII's legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting passage of the Act. Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex," stand only as "inert language, lifeless words," and, perhaps, even "playthings with which to reconstruct the Act." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (Frankfurter, J.). Accordingly, it becomes necessary to turn to Title VII's legislative history.

Just two days before the House of Representatives passed Title VII, it adopted an amendment adding "sex" as a prohibited basis for discrimination. Congressman Smith proposed the amendment to "do some good for the minority sex" by ensuring that women receive "as high compensation for their work as do the majority sex." 110 Cong. Rec. 2577 (1964). Congressman Celler opposed the amendment, arguing that the bill was already

"all-embracing," covering "everybody in the United States" including "white men and white women and all Americans." *Id.* at 2578. Congresswoman Griffiths, however, responded that when a qualified white woman is denied a job because she is a woman, she has no recourse without the amendment. *Id.* at 2579. To combat such discrimination, the House adopted Congressman Smith's amendment, adding "sex" as a prohibited basis for discrimination.[1]

While Congress' particular focus in amending Title VII to prohibit discrimination on the basis of "sex" was to ensure equal employment rights for women, the Supreme Court has interpreted the Act's broad language to protect both men and women. *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (holding that insurance plan that provided less extensive pregnancy benefits to married male employees than

---

[1] Because Congress intended that the term "sex" in Title VII mean simply "man" or "woman," there is no need to distinguish between the terms "sex" and "gender" in Title VII cases. Consequently, courts, speaking in the context of Title VII, have used the term "sex" and "gender" interchangeably to refer simply to the fact that an employee is male or female. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989) (using "gender" and "sex" interchangeably). Indeed, the use of "sex" and "gender" interchangeably may impose a useful limit on the term "sex," which otherwise might be interpreted to include sexual behavior. Some academic writers, however, seek to maintain or to heighten a distinction between the terms "sex" and "gender," asserting that "gender" connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L. J. 1 (1995) ("gender [is] to sex what masculine and feminine are to male and female"). *See also JEB v. Alabama*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting). While it may be useful to disaggregate the definition of "gender" from "sex" for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman.

to married female employees discriminated against males in violation of Title VII). Examining the legislative history of the Pregnancy Discrimination Act, which amended Title VII in 1978, the Court in *Newport News* reasoned that even though "congressional discussion focused on the needs of female members of the work force . . . [t]his does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment." *Id.* at 679; *cf*. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII proscribes racial discrimination against whites "upon the same standards" as racial discrimination against non whites).

In 1986, the Supreme Court expanded the scope of Title VII in yet another direction by recognizing that the prohibition against "discrimination" protects employees from "discriminatory sexual *harassment*." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 6466 (1986) (emphasis added). Noting that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination" but rather "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," the *Meritor* Court announced that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64 (alteration in original) (citation omitted). Thus, the Court established that a claim of "hostile environment" sex discrimination is actionable under Title VII. *Id.* at 73.

While the Supreme Court has interpreted Title VII to protect both men and women against workplace sexual harassment by the opposite sex, it has not specifically addressed the question of whether the Act's prohibitions apply when the harasser and the victim are the same sex. The EEOC and several circuits, however, appear to agree that Title VII may cover same-sex harassment.

The EEOC Compliance Manual states that the respective sexes of the harasser and the victim are irrelevant in determining whether Title VII has been violated:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way.

EEOC Compliance Manual, § 615.2(b)(3). Although the courts are not bound by the EEOC's interpretation of Title VII, it is nevertheless appropriate to consider the EEOC's interpretation because of the EEOC's charge to enforce the Act. *See Meritor*, 477 U.S. at 65.

The District of Columbia Circuit has acknowledged the possibility of actionable sexual harassment under Title VII where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender." *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). That same court subsequently reiterated, "in each instance the question is . . . would the complaining employee have suffered the harassment had he or she been of a different gender?" *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981). Similarly, in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995), the Seventh Circuit commented that "[s]exual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases." *See also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.

1994) (commenting that "we do not rule out the possibility that *both* men and women . . . have viable claims against [a male supervisor] for sexual harassment"), *cert. denied*, 115 S. Ct. 733 (1995); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993) (Van Graafeiland, J., concurring) (arguing that "harassment is harassment regardless of whether it is caused by a member of the same or opposite sex"), *cert. denied*, 114 S. Ct. 1189 (1994); *cf. Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192 (1st Cir.1990) (holding that homosexual advances by male coworker were not sufficiently severe or pervasive to be actionable).

Thus far, only the Fifth Circuit has expressly refused to recognize a cause of action for same-gender sexual harassment. *See Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994). In *Garcia*, the court held, without any discussion, that "'[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones'" because "'Title VII addresses gender discrimination.'" *Id.* at 45152 (quoting *Giddens v. Shell Oil Co.*, No. 92-8533, slip op. at 1-2 (5th Cir. Dec. 6, 1993) (reasoning that employee "did not allege how his employer treated him differently because he was a male") (unpublished), *cert. denied*, 115 S. Ct. 311 (1994)). *Garcia* also cited *Goluszek v. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988), a case in which an "unsophisticated" male mechanic, who had "little or no sexual experience" and was "abnormally sensitive to comments pertaining to sex," had been teased about women by co-workers using crude language and nude photographs. In *Goluszek* , the district court held that harassment by fellow male co-workers in a male-dominated environment "was not the type of conduct Congress intended to sanction when it enacted Title VII." *Id.* at 1456.

District courts across the country are deeply divided on whether Title VII applies to same-gender sexual harassment.[2] In the case before us, the district court concluded that same-gender sexual harassment is never actionable under Title VII. *Hopkins*, 871 F. Supp. at 834.

In addressing this issue, I do not find persuasive the reasoning of the Fifth Circuit in *Garcia* and those district courts that have concluded *categorically* that same-gender sexual harassment can never be actionable under Title VII. In aligning myself with those courts that have observed that same-gender sexual harassment may be actionable under Title VII in appropriate circumstances, I conclude that such a holding is required by the statutory language, understood in its historical context and as subsequently interpreted by the Supreme Court. While it is apparent from the historical record that Congress, in prohibiting sex discrimination, meant to prohibit discrimination only on the basis of the employee's status as a man or a woman, it is also clear from the statutory language itself that only the sex of the *employee* is relevant in determining whether Title VII is implicated. Title VII imposes no gender restriction for the person effecting the discrimination; it prohibits discriminatory conduct by an "employer," regardless of the employer's gender or the gender of those whose conduct imputes

---

[2] *Compare, e.g., Sardinia v. Dellwood Foods, Inc.*, 1995 WL 640502 (S.D.N.Y. 1995) (holding that same-sex sexual harassment claims are actionable under Title VII) *and Griffith v. Keystone Steel & Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995) (same) *and Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995) (same) *with Ashworth v. Roundup Co.*, 1995 WL 520699 (W.D. Wash. 1995) (holding that same-sex sexual harassment claims are *not* actionable under Title VII) *and Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (same) *and Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995) (same). Supp. 1452 (N.D. Ill. 1988) (same) *and Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995) (same).

liability to the employer. Thus, the requisite causation of prohibited conduct is defined only by the status of the *employee* as a man or a woman.

It follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability. *See McWilliams v. Fairfax County Bd. of Supervisors*, No. 94-1607, slip op. at 7 (4th Cir. Jan. 9, 1996) (explaining that "because of . . . sex" in Title VII does not mean because of "the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually focused speech or conduct"). Similarly, Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman.[3] Thus, as the Supreme Court observed in *Price Waterhouse v. Hopkins*, "[W]hile an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a [bona fide occupational qualification]), it is free to decide against a woman *for other reasons*." 490 U.S. 228, 244 (1989) (emphasis added).

Moreover, since the language of Title VII prohibits sex *discrimination* based solely on the employee's gender without consideration of the gender of the person effecting the discrimination, because of the holding in *Meritor* the Act must be

---

[3] Recognizing that Title VII does not prohibit discrimination because of sexual orientation, several local civil rights laws have added "sexual orientation" as a proscribed basis of discrimination. *See, e.g.*, Montgomery County Code, § 27-19(a) (prohibiting discrimination because of an individual's "race, color, religion, creed, ancestry, national origin, age, sex, marital status, handicap or *sexual orientation*" (emphasis added)).

construed also to prohibit sexual *harassment* against an employee because of that employee's gender, regardless of the harasser's gender. As we noted earlier, in *Meritor* the Supreme Court concluded that sexual harassment, which is sufficiently severe and pervasive to alter the conditions of employment, constitutes discrimination of the type prohibited by Title VII. I therefore conclude that sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man.

The more difficult question arises as to what proof is necessary to demonstrate that harassment is because of the employee's gender and not for some other reason, particularly when the harasser and the victim are the same gender.

When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is "because of" the victim's gender. This presumption is grounded on the reality that sexual conduct directed by a man, for example, toward a woman is usually undertaken because the target is female and the same conduct would not have been directed toward another male. See , *e.g.*, *Barnes*, 561 F.2d at 90 (plaintiff "became target of her superior's sexual desires because she was a woman . . . . [N]o male employee was susceptible to such an approach"). But when the harasser and the victim are the same gender, the presumption is just the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons.

Thus, when a male employee seeks to prove that he has been sexually harassed by a person of the same sex, he carries the burden of proving that the harassment was directed against him "because of" his sex. The principal way in which this burden may be met is with proof that the harasser acted out of sexual attraction to the employee. In *McWilliams*, slip op. at 6-7 n.5, we noted that a male employee who undertakes to prove sexual harassment

directed at him by another male may use evidence of the harasser's homosexuality to demonstrate that the action was directed at him because he is a man. But we cautioned that proof of such homosexuality must include more than "merely suggestive" conduct. *Id.*

I recognize that conduct directed toward an employee of the same gender as the harasser can have sexual content or innuendo and, indeed, may be offensive. But unless such harassment is directed toward an employee "because of" his or her status as a man or a woman, it does not implicate Title VII. I reject the notion that when a man, for example, uses sexually oriented gestures and language, or engages in sexually perverse activity to harass another man, Title VII automatically imposes liability. Such conduct may constitute a common law tort, but, without more, it does not amount to discrimination against the employee because he is a man. "There perhaps 'ought to be a law against' . . . puerile and repulsive workplace behavior . . .in order to protect the victims against its indignities and debilitations, but . . . Title VII is not that law." *McWilliams*, slip op. at 8.

In sum, while harassment directed toward an individual employee by another individual of the same gender may be actionable if it is directed at the employee "because of" the employee's gender, the plaintiff must overcome the presumption in that circumstance that the harassment was "because of" that employee's gender.

III

Regardless of whether Hopkins' same-gender sexual harassment is actionable under Title VII, Hopkins still bears the burden of demonstrating, in the context of this case, that Swadow's alleged harassment was sufficiently severe or pervasive

to create an objectively hostile or abusive work environment and the harassment was directed at him because of his sex.[4]

Not all sexual harassment that is directed at an individual because of his or her sex is actionable. Title VII does not attempt "to purge the workplace of vulgarity." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995). As the Supreme Court recognized in *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993), "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *See also Meritor*, 477 U.S. at 67 (recognizing that conduct amounts to actionable sexual harassment only when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" (alteration in original) (citation omitted)).

In deciding whether the harassment to which Swadow allegedly subjected Hopkins was sufficiently severe or pervasive to bring it within Title VII's purview, we must examine the totality of the circumstances, including "[t]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 114 S. Ct. at 371. We recognize that the

---

[4] Generally, to establish a claim for sexual harassment under 42 U.S.C. § 2000e-2(a)(1), a plaintiff employee must prove that (1) the subject conduct was unwelcome; (2) it was based on the plaintiff's sex; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer. *See Spicer v. Commonwealth of Va.*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc). But in this case, elements (1) and (4) are not at issue.

"line between a merely unpleasant working environment . . . and a hostile or deeply repugnant one" may be difficult to discern. *Baskerville*, 50 F.3d at 431 (overturning jury verdict for employee in Title VII suit because incidents did not amount to actionable sexual harassment and employer took adequate remedial measures). After carefully considering the entire record before us, however, we are convinced that the conduct of which Hopkins complains was neither sufficiently severe nor sufficiently pervasive to create an environment that a reasonable man would find hostile or abusive.

For his claim, Hopkins relies on conduct by Swadow that was temporally diffuse, ambiguous, and often not directed specifically at him. First, the incidents that Hopkins recounts occurred intermittently over a seven year period, with gaps between incidents as great as a year. That alone suggests the absence of a condition sufficiently pervasive to establish Title VII liability. "A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage." *Baskerville*, 50 F.3d at 431.

Second, Swadow's alleged conduct toward Hopkins was sexually neutral or, at most, ambiguous. According to Hopkins, Swadow bumped into him, positioned a magnifying glass over his crotch, flipped his tie over to see its label, gave him a congratulatory kiss in the receiving line at Hopkins' wedding, and stared at him in the bathroom. Notably, Hopkins has not asserted that Swadow ever made an overt sexual proposition or touched Hopkins in a sexual manner. While Swadow's conduct was undoubtedly tasteless and inappropriately forward, we cannot conclude that it was "of the type that would interfere with a reasonable person's work performance . . . to the extent required by Title VII." *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (holding that allegations fell short of Title VII liability where male plaintiff claimed that male coworker stood

behind him and bumped into him while he mopped, "peeped" at him in restroom, and asked him to dance at Christmas party).

Third, several of the incidents upon which Hopkins relies occurred in group settings, and only Hopkins subjectively perceives them to have been directed solely at him. On one occasion, Hopkins was offended by Swadow's comment during a group discussion concerning how to use a sexual organ to survive a plane crash. On another occasion, he was offended by Swadow's comment—"Was it as good for you as it was for me?"—made after Swadow forced himself into a revolving door with a third party.

While we do not approve of Swadow's apparent willingness to offend and provoke employees with his ambiguously sexual innuendos, Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace. When presented in other Title VII cases with conduct of the type alleged by Hopkins in this case, we have consistently affirmed summary judgment dismissing the claims. *See, e.g., Dwyer v. Smith*, 867 F.2d 184, 187-88 (4th Cir. 1989) (affirming directed verdict in Title VII case despite evidence that female police officer was subjected to pornographic material placed in her station mailbox and to fellow officers' sexually explicit conversations); *Harris v. Clyburn*, 1995 WL 56634, at *3 (4th Cir. 1995) (unpublished) (per curiam) (affirming summary judgment for employer where "only specific factual allegation of sexual harassment [was] occasional tickling [by her male superior] in the hallway"); *Cobbins v. School Bd. of Lynchburg, Va.*, No. 90-1754, slip op. at 7-10 (4th Cir. Jan. 14, 1991) (unpublished) (per curiam) (holding that where male teacher asked female teacher out for a drink, asked her to perform tasks she perceived as secretarial, and struck her in a fight, purported harassment was not gender-based and was not sufficiently severe or pervasive). *See also Baskerville*, 50 F.3d at

430-31 (overturning verdict because evidence that her male superior called her "pretty girl," commented on her attire, and made "vulgar banter tinged with sexual innuendo" did not establish actionable Title VII claim).

Accordingly, we hold in this case that as a matter of law the conduct of which Hopkins complains, spread over seven years with significant time gaps between incidents, does not create a sufficiently hostile environment on which to rest a Title VII claim. Because we conclude that Swadow's alleged conduct was not sufficiently severe or pervasive for Hopkins to establish a prima facie case of sexual harassment under Title VII, we do not reach the question of whether it was directed at Hopkins because of his sex.

IV

Hopkins also contends that the district court erred in dismissing his claim that BG&E retaliated against him for complaining to management about Swadow's offensive conduct and for filing an EEOC complaint that alleged discriminatory sexual harassment. The district court concluded that Hopkins did not need to prevail on his underlying discrimination claim to succeed on his retaliation claim, but that he had failed to show that BG&E had taken any adverse employment action against him. *Hopkins*, 871 F. Supp. at 835-37. We agree.

Title VII prohibits an employer from discriminating against an employee in retaliation for that employee's opposition to, or complaint about, an unlawful employment practice. 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, Hopkins must show that (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and (3) a sufficient causal connection existed between his protected activity

and his employer's adverse employment action. *See McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991).

The record in this case, considered in the light most favorable to Hopkins, reveals that BG&E's entire Photographic Services Unit, including both Swadow's and Hopkins' positions, were eliminated as part of a 1,100-employee reduction in force and corporate restructuring that took place in October 1993. Hopkins continued to receive a full salary and benefits until January 1994 and could have continued his employment with BG&E in another capacity had he not voluntarily chosen to terminate it.

In addition to his alleged discharge, Hopkins attempts to characterize various other employment actions as adverse. For example, Hopkins was advised by BG&E officials on more than one occasion that he should forget about Swadow's conduct and "put it behind" him. On another occasion, Hopkins received a formal disciplinary warning for substituting a color print for an original conduct that Hopkins denies but the warning was subsequently removed from his personnel record. Both Hopkins and Swadow were required to undergo a "Fitness for Duty" psychological examination. Finally, although Hopkins' overall ratings on his evaluations remained the same after his complaints to management, Swadow wrote that Hopkins needed improvement in "job behavior" and "work relations."

We agree with the district court that no reasonable jury could find on these facts that Swadow or any other BG&E official took any adverse employment action against Hopkins because of his complaints about alleged sexual harassment. Hopkins was not discharged from his employment and the comments in question never amounted to or resulted in any adverse employment action.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

WILKINSON, Chief Judge, with whom HAMILTON, Circuit Judge, joins, concurring in part:

We are pleased to concur in parts I, III, and IV of Judge Niemeyer's opinion. Those sections ably demonstrate that every example of offensive and tasteless workplace conduct does not provide the basis of a cause of action under Title VII. *See, e.g., Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995). The discussion in part II on the actionability of same sex harassment, however, is quite unnecessary to the resolution of this case, and we do not concur in it.

Moreover, the inadvisability of undertaking such a discussion is underscored by Title VII itself. The general language used by Congress in Title VII makes its intentions with respect to the actionability of same sex conduct ambiguous at best. To expand the reach of Title VII to same sex harassment risks dragging a multitude of workplace conflicts before the courts that may well exceed both the language and intent of the statute. Indeed, it is anything but clear to us exactly which kinds of workplace behavior will be held to be actionable under this view and which will not.

Finally, the position taken by our good colleague in section II is in tension with this court's decision in *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) (rejecting Title VII hostile environment claims "where both the alleged harassers and the victim are heterosexuals of the same sex"). The court explained in *McWilliams* that same sex harassment all too often takes place not "`because of the [target's] sex'" but rather "`because of' the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually focused speech or conduct" or because of the perpetrator's own sexual "obsession," "insecurity," "vulgarity," or simple "meanness of spirit." *Id.* at 1196. While *McWilliams* technically did not reach

the question addressed by Judge Niemeyer in section II, *id.* at 1195 n.4, it surely suggested that the many possible explanations for same gender incidents dictate caution in recognizing them as the basis for a Title VII action. If Title VII is to be extended to cover a whole new generation of same sex harassment claims, it is far better that it be accomplished by legislative action than by judicial fiat. The last place to reach out to recognize such claims is a case whose lack of merit is, in all events, apparent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE E. HOPKINS, JR.	*	
Plaintiff	*	
vs .	*	
	*	CIVIL NO. H-93-4167
BALTIMORE GAS &	*	
ELECTRIC COMPANY	*	
Defendant	*	

* * * o0o * * *

Louis B. Close, Glenn E. Bushel, and Brocato, Price & Bushel, Baltimore, Maryland, for plaintiff.

L. Ellis Justis, J. Michael McGuire, Robert H. Ingle, III and Shawe & Rosenthal, Baltimore, Maryland, for defendant.

DATED: December 28, 1994

HARVEY, J.

In this civil action, plaintiff George E. Hopkins, a white male, has sued his former employer, Baltimore Gas and Electric Company ("BG&E" or the "Company"), asserting claims of sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et* seq. ("Title VII"). Plaintiff alleges that he was sexually harassed by his male supervisor at BG&E and that he was disciplined by that supervisor and by

others after he complained to BG&E officials about the supervisor's conduct. Plaintiff further alleges that he was terminated by BG&E in October of 1993 in retaliation for his having filed charges of discrimination and retaliation with the Equal Employment Opportunity Commission (the "EEOC").

Presently before the Court is a motion for summary judgment filed by defendant BG&E. Following its review of the memoranda, exhibits, affidavits, deposition excerpts and other discovery materials which the parties have submitted, the Court has determined that no hearing is necessary for a decision on the pending motion. *See* Local Rule 105.6. For the reasons to be stated, defendant's motion for summary judgment will be granted, and judgment will be entered in favor of BG&E.

I
Background Facts

Discovery has been completed in this action, and the parties have submitted extensive materials both in support of and in opposition to the pending motion for summary judgment. Viewing the record and all reasonable inferences drawn therefrom in the light most favorable to plaintiff, the facts of this case are as follows.[1]

---

[1] There are many disputed questions of fact as to the occurrence, timing and nature of many of the alleged acts of harassment of Ira Swadow. However, for reasons stated herein, these disputed issues of fact are not material to the essential in the case and do not preclude the entry of summary judgment. Even accepting as true plaintiff's version of the various events which are the subject of this litigation, this Court has concluded that plaintiff has failed to make out a prima facie case either of sex discrimination or of retaliation under Title VII. "Accordingly, the facts summarized below, where disputed, reflect plaintiff's version of the events to the extent it is supported by affidavits, depositions or other documentary evidence." *Magnusen v. Peak Tech. Services*, 808 F. Supp. 500, 504 (E.D. Va. 1992)

Plaintiff was employed by defendant BG&E as a Color Photographic Technician from September 3, 1985 until October 19, 1993. During this entire time, plaintiff worked in BG&E's Photographic Services Unit (the "Unit"), and his immediate supervisor was Ira Swadow. Plaintiff alleges that throughout his term of employment with BG&E he was subjected to various forms of harassment by Swadow, including jokes, comments, and gestures of a sexual nature. During the course of discovery in this case, plaintiff has identified over a dozen incidents of alleged "sexual harassment" by Swadow. Plaintiff contends that, when viewed in their entirety, these various incidents demonstrate that Swadow intentionally subjected plaintiff to a sexually abusive and hostile work environment in violation of Title VII. Since the case is now before the Court pursuant to defendant's motion for summary judgment, it is necessary to describe in some detail each of the alleged incidents upon which plaintiff has based his claims for relief under Title VII.

According to plaintiff, the earliest incident of harassment took place some time in 1986, when Swadow entered the men's room at work while plaintiff was using the facilities, pretended to lock the door, and said, "Ah, alone at last." Although plaintiff testified in his deposition taken in this case that Swadow's remark made him feel "very uncomfortable," plaintiff apparently ignored the remark at the time and left the bathroom without further comment or incident. Plaintiff also testified in his deposition that on other occasions when the two of them happened to be in the men's room at the same time, Swadow would look at plaintiff in the mirror in a way which caused plaintiff to feel "uncomfortable."[2]

---

[2] The apparent source of plaintiff's discomfort on these and other occasions was his suspicion and belief that Swadow was bisexual. Although Swadow was married with children during the events which are the subject of this litigation, plaintiff testified in his deposition that he believes that Swadow is bisexual, rather

According to plaintiff, he was on several occasions harassed by Swadow because of plaintiff's relationship with and eventual marriage to another BG&E employee, Jo-Ann Stansbury. On one occasion in 1987, plaintiff received a work-related document from Stansbury through the Company's internal mail system. Across the top of the document, someone other than Stansbury had written the words "S.W.A.K.[3], kiss kiss" and had drawn "little hearts." In his deposition, plaintiff testified that although he never asked Swadow if he had written these comments, plaintiff "knew" that Swadow had done so because he "recognized Swadow's handwriting."

On another occasion in February of 1988, during an office party given by plaintiff at his home and attended by Swadow, a comment was made by Swadow in the presence of plaintiff's future mother-in-law suggesting that an unplanned pregnancy had been the real reason for plaintiff's recent proposal of marriage to her daughter. Although plaintiff was not present at the time, he later learned of the comment from his future mother-in-law. Notwithstanding this continual "harassment," plaintiff apparently remained friendly with Swadow and invited Swadow to his wedding in June of 1988. According to plaintiff, Swadow managed to "sexually harass" him even on that occasion. At the reception following the wedding, Swadow approached plaintiff

---

than homosexual, because "he appears to like both men and women." There is evidence in the record indicating that Swadow had previously been accused of sexually harassing female employees at BG&E. In his answer to an interrogatory propounded by defendant BG&E, plaintiff stated under oath that Peggy Mulloy, a BG&E employee, once told him that she had previously been sexually harassed by Swadow. Defendant BG&E has confirmed that Mulloy did in fact once lodge an internal complaint with the Company in which she alleged that she had been sexually harassed by Swadow.

[3] In his deposition, plaintiff testified that he understood the acronym "S.W.A.K." to stand for the phrase "Sealed With A Kiss."

while he stood in the receiving line, embraced him, and kissed him on the cheek. Plaintiff testified in his deposition that he has a photograph of the incident and that he considered it to have been "sexual harassment" because Swadow was the only male who kissed him that day.

Other incidents of alleged harassment occurred prior to April of 1990.[4] On one occasion, Swadow approached plaintiff while he was leaning against a table at work, pivoted an illuminated magnifying lens so that it was positioned above plaintiff's crotch, and said, "Where is it?" Plaintiff testified in his deposition that he responded by pushing the lens away and by telling Swadow to leave him alone. On another occasion, Swadow and plaintiff bumped into one another, and Swadow said to plaintiff, "You only do that so you can touch me." Plaintiff testified in his deposition that he did not know whether Swadow's hands or just his body had come into contact on that occasion, but that Swadow had definitely not touched him in the genital area nor "in any other sexual area." On another occasion, Swadow asked plaintiff, "On a scale of 1 to 10, how much do you like me?" Plaintiff testified in his deposition that he found this remark to be "inappropriate" because "[i]t was like some high school kid asking a prospective boyfriend [or] girlfriend how much do you like me on a scale of 1 to 10. It was offensive and juvenile and certainly inappropriate from a supervisor."

On another occasion, Swadow removed a piece of mail from plaintiff's Company mail box, wrote the word "Alternate" in front of the word "Lifestyles," which happened to be printed on the

---

[4] Although plaintiff has not been able to identify the specific dates on which each of the incidents described hereinafter occurred, these incidents were discussed by plaintiff with various Company officials during or before April of 1990.

return address of the envelope, and then placed the altered envelope back in plaintiff's mail box. Plaintiff testified in his deposition that he understood the term "alternate lifestyles" to refer to Swadow's sexual orientation. On another occasion, in the course of a discussion which Swadow was having with plaintiff and vendor concerning the difficulties of surviving an airline crash in water, Swadow said that if he were in such a situation he would "find a dead man, cut off his penis and breathe through that." In his deposition, plaintiff testified that he told Swadow that he was "sick" and that his remark was "inappropriate," particularly in the presence of some one not employed by the Company.

On several other occasions, Swadow made inquiries and comments which plaintiff felt were embarrassing and "overly personal." For example, once while plaintiff was demonstrating the operation of the color darkroom to a female visitor, Swadow called out to plaintiff as Swadow was coming through the revolving entrance to the darkroom, "Are you decent?" On other occasions before plaintiff's engagement, Swadow asked plaintiff whether he had gone on any dates over the weekend and, if so, whether any of those dates had culminated in sexual intercourse.

Although several of the incidents described herein above occurred as early as 1986, plaintiff did not complain to Company officials concerning Swadow's alleged harassment until the Fall of 1989. In September of 1989, plaintiff met with Fran Johannson, Swadow's immediate superior at the time, and related to her many of the incidents described herein above. About the same time, plaintiff also spoke with Bill Dunson, BG&E's Employee Grievance Coordinator. Pursuant to the Company's internal grievance procedures, Dunson filled out a grievance form dated September 19, 1989, in which he summarized plaintiff's allegations as follows:

> Says Swadow is unsupportive of his medical restrictions & wants 15% OT [overtime]. Also makes inappropriate & sexual comments and behavior -- focuses magnifier on crotch and says "where is it (penis)?" Bumps him & says "You like to touch me." Makes sexual/ethnic jokes in group sessions.

After interviewing Swadow and several other employees who worked in the Unit, both Johannson and Dunson concluded that there was "no substance" to plaintiff's allegations of sexual harassment. Johannson then met with plaintiff and informed him that she had been unable to find any support for his allegations, but that she had spoken with Swadow about the matter and that the situation should return to normal. According to plaintiff, the sexual harassment did in fact "diminish considerably" for about a period of time.

In early April of 1990, plaintiff again contacted Johannson and told her that the harassment had resumed and that Swadow also had begun to retaliate against him by "looking at [plaintiff's] work a little more closely than he had used to and [by] pushing [plaintiff] to do overtime, things like that." Plaintiff also told Johannson that he wanted to take his complaints to the "next level" of Company administration. Johannson then arranged for plaintiff to meet with George Gephart, Manager of Corporate Communications. A meeting was scheduled for April 10, 1990.

Just prior to his scheduled meeting with Gephart, plaintiff received his annual performance appraisal for the preceding twelve months (the "1990 appraisal"). The appraisal was dated March, 1990 and had been prepared by Swadow and signed by Johannson. The 1990 appraisal indicated that plaintiff's overall job performance was rated as a "B," meaning that plaintiff had "met expectations." However, plaintiff's performance in three of the six individual categories (quality of work, dependability, and job behavior) was rated at the level of "needs improvement," and

plaintiff's performance in one other individual category (work relations) was rated at the level of "unsatisfactory." The 1990 appraisal also contained comments to the effect that plaintiff "[a]bsolutely must immediately work on improving relationships with colleagues in the Unit" and that plaintiff's "patronizing and arrogant attitude towards and criticism of Senior Photographers is inappropriate." In addition, the 1990 appraisal criticized plaintiff for refusing to work overtime and for making excessive requests for both personal leave and sick leave.[5]

On April 10, 1990, plaintiff met with Gephart and presented him with a seven-page document entitled "Unit Situation Report" which plaintiff had prepared in anticipation of their meeting. In that Report, plaintiff set forth wide-ranging allegations of incompetence and malfeasance on the part of Swadow and others in the Photographic Unit .[6] Although he briefly reiterated several

---

[5] Plaintiff's salary increases and other benefits were not adversely affected in any way by the 1990 appraisal. Indeed, because plaintiff was rated (by Swadow) at an overall job performance level of "B" on every performance appraisal he received during the course of his employment at BG&E, plaintiff's salary increases and other benefits were not at any time adversely affected by such appraisals.

[6] In his Report, plaintiff alleged, *inter alia*, that Swadow repeatedly violated or ignored Company safety guidelines; that he was unresponsive to the health and safety concerns of those working under his supervision; that he had on several occasions violated the Company's policies relating to conflicts-of-interest by accepting gifts and other valuable consideration from parties doing business with the Company; that he had a "history" of telling ethnic and racial jokes; and that he often attended to purely personal matters while purportedly working "overtime."

Swadow was not the only one whose competence and professionalism were attacked by plaintiff in the Report. For example, plaintiff also stated his opinion that the Senior Photographers in the Unit lacked "the technical skills or expertise to perform their duties" and that "the cover-up of their deficiencies by supervision is detrimental to unit morale and costly to the Company."

of the alleged incidents of sexual harassment about which he had previously complained to Johannson and Dunson in September of 1989, plaintiff focused essentially in his Report on numerous extraneous matters completely unrelated to his claims of sexual harassment. Indeed, plaintiff acknowledged in his conclusion to the Report that "[t]his past September I discussed all of the things talked about here with Fran Johannson" and that since that time "[t]he sexual harassment seems to have stopped, permanently I hope. "[7]

Gephart told plaintiff that he would refer plaintiff's allegations of sexual harassment to Anton Endler, BG&E's Manager of Employee Services, for further investigation. Gephart and plaintiff then discussed the 1990 appraisal which plaintiff had just received. Plaintiff told Gephart that there were a number of inconsistencies, contradictions and outright falsehoods contained in the appraisal. Although Gephart refused to overrule Swadow and Johannson in their overall job performance rating of "B," certain other changes to plaintiff's 1990 appraisal were eventually made at Gephart's direction.[8]

Following his April 10, 1990 meeting with plaintiff, Gephart referred plaintiff's Report to Endler, who directed Faye Pines, a case analyst in the Company's Employee Services Department, to investigate the various allegations made therein by plaintiff. Pines

---

[7] This statement made by plaintiff contemporaneously in April of 1990 in his Report contradicts his present assertion that the alleged sexual harassment by Swadow continued during the period from September of 1989 to April of 1990.

[8] Specifically, two of the "needs improvement" ratings were raised to the level of "meets expectations," certain comments relating to plaintiff's requests for leave were deleted from the appraisal, and Swadow was directed to make an interim appraisal of plaintiff's progress in July of 1990. In that interim appraisal, plaintiff was rated at the "meets expectations" level in all six individual categories and again received an overall rating of "B."

interviewed plaintiff and Swadow, as well as some eight other BG&E employees who worked in the Photographic Unit. Pines' summary of her April 16, 1990 interview with plaintiff indicates that plaintiff told her that the sexual harassment by Swadow had ended in September of 1989,[9] that Swadow had never physically touched him, and that he could not recall Swadow ever making any explicit sexual remark. Pines set forth the results of her investigation in a report dated April 25, 1990 which she submitted to Endler. In her report, Pines stated that "Swadow probably has been easy going with employees and probably has been playful with individuals he supervises. But, I cannot conclude that the behavior was sexually motivated." Pines further stated that her "impression is that [plaintiff] is indeed trying to 'hang' Swadow (to use the words of [plaintiff's] only friend, Charlie Ashton)."[10] Pines' ultimate recommendation was that no "corrective action" was needed because the Unit's work environment did not appear to be "tainted by race or sex activities."

Some time thereafter, plaintiff had a follow-up meeting with Endler. At that meeting, Endler allegedly told plaintiff that if he continued to pursue this matter he could end up losing his job and that he should just "forget it" and get on with his life.

Plaintiff later met again with Dunson. Pursuant to Company policy, Dunson had filled out another grievance form which related to the complaints which plaintiff made to Johannson in early April of 1990. In that grievance form, which is dated April 5, 1990, Dunson summarized plaintiff's complaints as follows:

> Says his supervisor intimidates, stresses out, and continues to make sexual innuendo-type comments.

---

[9] See note 7, *supra*.

[10] Ashton was a co-worker in the Unit.

> . . . On April 10, [plaintiff] presented a 7 page document identifying concerns. Issues were favoritism, joking, Swadow's relationship with subordinates, and workplace atmosphere. Additionally, he vehemently disagreed with negative comments on his 3/90 appraisal.

At their meeting, Dunson advised plaintiff that because the sexual harassment issues had already been investigated by him in connection with the grievance initiated by plaintiff on September 19, 1989 and had been found to be without substance, and because plaintiff was not alleging that any further incidents of sexual harassment had occurred since then, no further action would be taken by the Company in that regard. Dunson told plaintiff that he should put those earlier incidents behind him, that certain changes had been made to plaintiff's 1990 appraisal and that Swadow would continue to be "under close scrutiny." It was Dunson's impression that plaintiff was satisfied with these results.

Over a year later, in May of 1991, Swadow asked plaintiff to reprint a particular photograph which plaintiff had previously prepared. Swadow believed that the print was very much out of focus. Plaintiff told Swadow that the problem was with the photographic negative and that a reprint would be a waste of time. Swadow told plaintiff to do it anyway. Plaintiff then produced several reprints of the photograph using various techniques and equipment. Plaintiff also asked a co-worker to prepare a reprint using her own equipment. Plaintiff then returned to Swadow three prints which purportedly were the original print along with the two requested reprints. Because all three prints appeared to be the same and because they appeared to be more focused than was the original print, Swadow questioned whether plaintiff had in fact returned the original out-of-focus print which Swadow had seen earlier. Plaintiff said that he had. After conferring with three other employees in the Unit who had seen the original out-of-focus print and who had all concurred in Swadow's opinion that the purported

"original" returned by plaintiff was not the same out-of focus print which they had seen earlier, Swadow accused plaintiff of having switched one of his reprints for the "real" original in an attempt to "trick" Swadow and avoid being "put on the spot" for his poor work in producing the "real" original.

On June 10, 1991, plaintiff was issued a "Formal Warning" by Swadow, with Johannson's concurrence, on the asserted ground that plaintiff had not been "truthful" with Swadow in connection with the incident described herein above. In response to this Formal Warning, plaintiff met with Joseph Tiernan, Vice President of Corporate Affairs. In his notes summarizing their meeting, Tiernan observed that "it does appear that there's a fair amount of contention among [plaintiff], the photographers, and Ira Swadow, primarily dealing with the issues of the quality of photographs and personality conflicts." Tiernan also noted that "some kind of psychological testing or counseling for [plaintiff] and perhaps Swadow might be useful." No mention was made in Tiernan's notes of any complaints made by plaintiff at the time of being sexually harassed by Swadow. At the conclusion of their meeting, Tiernan told plaintiff that the matter would be thoroughly investigated.

An investigation was then conducted by Jim O'Connell, a case analyst in the Company's Employee Services Department. O'Connell interviewed plaintiff, Swadow and the three other employees in the Unit who had seen both the "real" original print and the purported "original" print returned by plaintiff. O'Connell concluded that each of the three other employees corroborated Swadow's version of the incident, namely, that plaintiff had switched the prints and had not been truthful.

On June 21, 1991, both plaintiff and Swadow were referred to the Company's in-house medical staff for psychological evaluations. Plaintiff and Swadow were then separately

interviewed by Dr. Bruce Martenis, a psychologist. Martenis concluded that both plaintiff and Swadow were fit to return to work.

After having received the reports and recommendations of both O'Connell and Dr. Martenis, Endler met with plaintiff and Swadow and told them that the Formal Warning would stand and that they should both return to work and put the incident behind them. According to plaintiff, Endler told plaintiff and Swadow that they "should stop acting like little boys." Plaintiff later met with Tiernan, who confirmed that the Company considered the matter to be closed.[11]

According to plaintiff, the harassment and retaliation only increased following the Company's decision not to pursue matters further. Swadow allegedly threatened plaintiff by telling him that he was mistaken if he thought that it was over between them. Swadow also allegedly told plaintiff that he wanted to inspect plaintiff's work at the end of each day before plaintiff went home and that plaintiff would no longer be permitted to do personal work in the darkroom. According to plaintiff, on August 1, 1991, Swadow sexually harassed plaintiff yet again. On that date, plaintiff was working by himself in the darkroom when he heard the revolving entrance to the darkroom begin to rotate, indicating that some one was coming into the darkroom from the outside. Ordinarily, only one person at a time can fit through the revolving

---

[11] In November of 1992, the Formal Warning was removed from plaintiff's personnel file at the direction of Edwards, who had recently replaced Gephart as Manager of the Department in which plaintiff worked. In an affidavit submitted in support of the defendant's motion for summary, Edwards states that he did this because he "wanted to afford [plaintiff] a 'clean slate' and..... assist [plaintiff] in returning his focus to his job duties and his future employment." Edwards further states in his affidavit that his action was not because he had "reached any conclusion about the basis for the [Formal Warning]."

entrance to the darkroom, which is very small because of the need to prevent light from the outside from contaminating the exposed film in the darkroom. On this occasion, however, Swadow and another male employee had both squeezed into the revolving compartment at the same time, and upon exiting from that small space, Swadow looked at plaintiff and said, "Was it as good for you as it was for me?" Some time thereafter, Swadow allegedly attempted in a similar fashion to squeeze into the small, revolving compartment at the same time as plaintiff, but plaintiff objected and refused to allow Swadow to do so. Plaintiff now contends that Swadow's conduct on both of these occasions constituted sexual harassment.

On or about December 20, 1991, plaintiff filed a charge of discrimination and retaliation with the EEOC (the "Charge"), alleging that, "on a continuing basis" since he began his employment with BG&E in September of 1985, plaintiff had been subjected to "sexual harassment, repeated jokes, comments and gestures of a sexual nature" by his supervisor, Swadow. Plaintiff alleged that this harassment had created a hostile work environment and had continued despite the fact that plaintiff had brought his claim of harassment to the attention of numerous Company officials in 1990. Plaintiff further alleged that he had been "retaliated against by being disciplined on June 24, 1991."[12]

---

[12] The record here does not indicate that any actionable retaliation occurred on June 24, 1991. The Formal Warning was issued to plaintiff on June 10, 1991. The psychological evaluation which plaintiff was required to undergo as a result of the Formal Warning took place on June 21, 1991. Plaintiff now contends that both of these incidents were retaliation against him on account of his complaints of sexual harassment by Swadow. However, the specific reference in the Charge to the date of June 24, 1991 suggests that the retaliation of which plaintiff was complaining relates to another incident. According to plaintiff, on that date Johannson and Swadow presented plaintiff with a revised Formal Warning for his signature. When plaintiff refused to sign the document unless he could first make a photocopy of it, Johannson allegedly "fired" plaintiff by demanding his

The EEOC never completed its investigation of plaintiff's charges. Rather, at plaintiff's request, on September 30, 1993, the EEOC terminated its investigation and issued to plaintiff a "right-to-sue" notice. According to plaintiff, the harassment and retaliation continued even after he filed his Charge with the EEOC. Plaintiff alleges that on several occasions Swadow required him to perform strenuous physical activities and to work overtime despite medical restrictions related to surgery which plaintiff had undergone in late 1991. Plaintiff also complains of certain "negative comments" contained in his annual performance appraisal dated September, 1992. However, in his deposition, plaintiff admitted that his salary and other benefits had not been reduced or otherwise adversely affected in any way as a result of these comments. Plaintiff also complains of Edwards' "retraction" of his prior approval of plaintiff's request to attend an advanced computer seminar. In his affidavit, Edwards states that his approval of plaintiff's request was subject to review by the Employee Services Department, which had concluded that plaintiff did not have the educational prerequisites to attend a seminar at such an advanced level. Plaintiff has not disputed Edwards' statement in this regard.

Concerning his allegations of continued sexual harassment by Swadow during the pendency of the EEOC's investigation of plaintiff's Charge, plaintiff has identified only two incidents. On the first such occasion, which allegedly occurred in May of 1993, Swadow approached plaintiff, who happened to be wearing a certain necktie that day at work, and said, "You look so

---

Company identification card and telling him to "pack up, and get out." Plaintiff's employment with BG&E was not in fact terminated at that time, and plaintiff eventually signed the document after Johannson permitted him to first make handwritten notes of its contents. The record clearly reveals that plaintiff's employment status with the Company was not adversely affected in any way as a result of the incident which occurred on June 24, 1991.

distinguished." Swadow then lifted plaintiff's necktie and turned it over to look at its label. Although plaintiff apparently did not at the time object to Swadow's conduct, plaintiff now contends that he considered Swadow's comments and conduct to be sexual harassment because of the "strange look" which Swadow had at the time and because "he [Swadow] had been told by me and others not to do that kind of thing."[13] On another occasion the following month, while Swadow and plaintiff were discussing a particular photographic negative, Swadow allegedly said "something like orientation is subjective and gave [plaintiff] a very peculiar look." In his deposition, plaintiff testified that he took this comment to be a reference to Swadow's sexual orientation.

In August of 1993, the Company decided that approximately $50 million in annual costs needed to be eliminated from its budget. The Company thus directed all department managers, including Edwards, to find areas in their respective departments which could be cut in order to achieve the desired reduction in costs. In October of 1993, these efforts resulted in a large-scale reorganization and reduction in work force which eliminated the positions held by some 1,100 of BG&E's 9,100 employees.

On October 19, 1993, as part of this reorganization and reduction in work force, the entire Photographic Services Unit was abolished and all 13 positions in the Unit were eliminated, including those held by both plaintiff and Swadow. The decision to eliminate the Photographic Services Unit was made by Edwards and was based upon an internal audit[14] which had concluded that

[13] Plaintiff also testified in his deposition that Swadow "regularly" commented on plaintiff's appearance or clothing, saying for example that a particular shirt worn by plaintiff was "bright and cheery" or that he had been admiring plaintiff's outfit "from afar."

[14] The audit was conducted by Richard Bonney, a supervisor in Edwards's

the Company could save in the range of $100,000 to $200,000 annually by contracting out the work performed by the Unit.[15]

Although his position was terminated on October 19, 1993, plaintiff was not at that time discharged from BG&E's employment. Rather, the uncontradicted evidence of record here reveals that plaintiff participated in BG&E's Career Transition Center from October 19, 1993 until January 31, 1994, during which time plaintiff not only continued to receive his full salary and all regular employee benefits, but also continued to accrue employment time for pension and benefits purposes.

On December 23, 1993, plaintiff filed this civil action against BG&E in this Court, alleging claims of sex discrimination and retaliation under Title VII. Following the completion of extensive discovery, BG&E has moved for summary judgment as to all of plaintiff's claims.

II

Summary Judgment Principles

It is well established that a defendant moving for summary judgment bears the burden of showing the absence of any genuine issue of material fact and that it is entitled to judgment as a matter of law. *Barwick v. Celotex*, 736 F.2d 946, 958 (4th Cir. 1984). Where, as here, the nonmoving party will bear the ultimate burden of persuasion at trial, "the burden on the moving party [at the summary judgment stage] may be discharged by 'showing' -- that

Department, in conjunction with a representative from the Company's Purchasing Department.

[15] In an affidavit submitted in support of defendant's motion for summary judgment, Edwards states that the decision to contract out the work formerly performed by the Photographic Services Unit has actually resulted in annual savings to the Company in excess of $400,000. Plaintiff has not disputed any of defendant's figures in this regard.

is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's *case." Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). One of the purposes of Rule 56 of the Federal Rules of Civil Procedure is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and properly supported, to come forward with some minimal facts to show that the defendant in the case may be liable under the claims alleged. Rule 56(e). If the nonmoving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then "the plain language of Rule 56(c) mandates the entry of summary judgment." *Catrett*, 477 U.S. at 323, 322.

While the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the party opposing the motion, *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "'A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984), (quoting *Seago v. North Carolina Theaters. Inc.*, 42 F.R.D. 627, 640 (E.D.N.C. 1966), 987 (4th Cir. 1967)). Moreover, only disputed issues of *material* fact, determined by reference to the applicable substantive law, will preclude the entry of summary judgment. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

In the absence of such a minimal showing by a plaintiff, a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial. *See Anderson*, 477 U.S. at 256-57; *Catrett*, 477 U.S. at 323-24. Indeed, the

Fourth Circuit has stated that, with regard to motions for summary judgment, the district courts have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Catrett*, 477 U.S. at 323-24).

Applying these principles to the facts of record here, this Court has concluded that defendant's motion for summary judgment must be granted.

Applying these principles to the facts of record here, this Court has concluded that defendant's motion for summary judgment must be granted.

III

Discussion

Before considering the merits here, the Court must first address an important threshold question, namely, whether same-gender sexual harassment is actionable under federal law. Specifically, the issue which has been raised here by defendant BG&E in its motion for summary judgment is whether the alleged sexual harassment of a male employee by his male supervisor constitutes prohibited discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. No reported decision of the Fourth Circuit has addressed this issue.

(a)
Same-Gender Sexual Harassment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank. FSB v. Vinson*, 477 U.S. 57 (1986), the Supreme Court recognized for the first time that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." *Id.* at 66.[16] The Court reasoned that an employer who creates or condones a work environment which is discriminatorily hostile or abusive to members of a protected class, such as blacks or women, is thereby discriminating "with respect to . . . terms [and] conditions . . . of employment." *Id.* Title VII thus affords employees the right to work in an environment free from "discriminatory intimidation, ridicule, and insult." *Id.* at 65. Following the lead of several circuit courts of appeals, the Supreme Court further held that "unwelcome sexual advances that create an offensive or hostile working environment" may form the basis of a claim of sex discrimination under Title VII. *Id.* at 64; *accord Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

However, not all sexual harassment is actionable under Title VII. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive' to alter the conditions of the victim's] employment and create a hostile or abusive work environment.'" *Vinson*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (llth Cir. 1982)). In *Harris v. Forklift Sys.*, 62 U.S.L.W. 4004 (Nov. 9, 1993), the Court expressly reaffirmed its decision in *Vinson*, noting that the standard set forth in that opinion "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* at 4005. The issue

---

[16] Sexual misconduct directly linked to the grant or denial of an economic *quid pro quo* also violates Title VII. *Vinson*, U.S. at 65. In this case, however, plaintiff has neither alleged nor argued that Swadow's conduct in any way constituted *quid pro quo* sexual harassment.

before the Court in *Harris* was "whether conduct, to be actionable as 'abusive work environment' harassment . . ., must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury." Id. Rejecting any such requirement as not being supported by the language of Title VII, the Supreme Court in 477 *Harris* held that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers." *Id.*

(7) It is thus well-established by *Vinson* and *Harris* that Title VII prohibits the pervasive and abusive sexual harassment of a female employee by a male supervisor or co-worker. *Vinson* and *Harris* did not, however, address the viability under Title VII of a claim of same-gender sexual harassment. Title VII by its terms prohibits sex discrimination, not sexual harassment.[17] Neither *Vinson* nor *Harris* discussed in any significant detail the doctrinal basis for classifying sexual harassment as sex discrimination.[18] In

---

[17] Courts have recognized that the word "sex" as used in Title VII means, in effect, "gender." *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984), *cert. denied*, 471 U.S. 1017, 105 S.Ct. 2023, 85 L.Ed.2d 304 (1985); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir.1977). Thus, courts have consistently held that Title VII does not prohibit discrimination of the basis of sexual orientation or preference; *see, e.g., Williamson v. A. G. Edwards & Sons, Inc.* 876 F.2d 69 (8th Cir.1989), *cert. denied*, 493 U.S. 1089, 110 S.Ct. 1158, 107 L.Ed.2d 1061 (1990); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 , (9th Cir.1979); nor discrimination on the basis of "sexual identity;" *see, e.g., Ulane*, 742 F.2d at 1084-85 (transsexual employee fired for having sex change operation could not maintain cause of action under Title VII); *Powell v. Read's, Inc.*, 436 F.Supp. 369, 371 (D.Md.1977) (same); nor "sexual harassment" based on a belief that the victim is homosexual.

[18] Indeed, some judges and commentators have criticized "the awkwardness of classifying sexual advances as 'discrimination,'" *Vinson v. Taylor*, 760 F.2d 1330, 1333 n. 7 (D.C.Cir.1985) (Bork, J., joined by Scalia and Starr, JJ., dissenting from denial of rehearing *en banc*), aff'd on other grounds sub nom, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49

Vinson, the Court merely stated that "(w)ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. It has been suggested that the "discrimination" which brings a claim of sexual harassment within the scope of Title VII arises from "the differentiating libido" of the alleged harasser. *Vinson*, 760 F.2d at 1333 n.7 (Bork, J., dissenting from denial of rehearing en banc). In other words, the male supervisor who subjects a female subordinate to unwanted sexual advances or demands has imposed an undue burden upon that female employee which, "but for" her gender, he would not have imposed upon her and which he presumably would not have placed on a similarly situated male subordinate. In *Harris*, the Supreme Court repeatedly emphasized that it had not in *Vinson* moved away from a disparate treatment or "but for" theory of sexual harassment as sex discrimination. *See Harris*, 62 U.S.L.W. at 4005 (Title VII violated only if "*discriminatory* conduct was so severe or pervasive that it created a work environment abusive to employees *because of* their . . . gender"); *id.* ("*discriminatory* intimidation, ridicule, and insult"); *id.* ("[a] *discriminatorily* abusive work environment"); *compare id.* at 4006 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (Ginsburg, J., concurring).

Insofar as the claim at issue here is concerned, the Supreme Court's discussion in *Vinson* and *Harris* of the doctrinal basis for

---

(1986)); *see also, e.g.*, E. Paul, *Sexual Harassment as Sexual Discrimination: A Defective Paradigm*, 8 Yale L. & Pol'y Rev. 333 (1990) arguing that "(t)he subsumption of sexual harassment under Title VII's ban on sex discrimination in employment" has no basis in either the language or the legislative history of Title VII, generally numerous doctrinal difficulties and anomalies, and should be reconsidered and rejected in favor of a new common law tort of sexual harassment.

sexual harassment raises almost as many questions as it answers. For example, as several of the courts of appeals have recognized in *dicta*, the sexual harassment of an employee of either gender by a bisexual harasser would presumably fall without the scope of prohibited conduct under Title VII. *See Rabidue v. Oceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 902 (llth Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); but see Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337 (D. Wyoming 1993) ("the equal harassment of both genders does not escape the purview of Title VII"). "'Taking the point one step further, it also seems peculiar to call sexual harassment of a male by a male, or [of] a female by a female, sex discrimination. . . . What the harasser is really doing is preferring or selecting some one member of his [own] gender for sexual attention, however unwelcome that attention may be to its object. He certainly does not despise the entire group, nor does he wish to harm its members, since he is a member himself and finds others of the group sexually attractive.'" *Chiapuzio*, 826 F. Supp. at 1337 n.1 (quoting E.Paul, *supra*, 8 Yale L. & Pol'y Rev. at 351-52).

Until recently, the few federal courts which had addressed this issue squarely had consistently held, albeit without extensive discussion, that Title VII prohibits same-gender sexual harassment.[19] However, on July 29, 1994, the United States Court

---

[19] Prior *to Garcia* , at least two federal district courts had held, without much discussion, that same-gender sexual harassment was within Title VII's prohibition of sex discrimination. *See Joyner v. AAA Cooper Trans.*, 597 F. Supp. 537, 541 (M.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984)

(table); *Wright v. Methodist Youth Services. Inc.*, 511 F. Supp. 307, 309-10 (N.D. Ill. 1981)). As late as 1990, *Joyner* and *Wright* were cited as the only two prior reported decisions "dealing with unwelcome homosexual advances." *Parrish v. Washington Nat'l Ins. Co.*, 1990 U.S. Dist. LEXIS 13934, at 8-9 n.2 (N.D. Ill. Oct. 16, 1990). In *Parrish*, the Court stated in *dicta* that "unwelcome homosexual

of Appeals for the Fifth Circuit handed down its opinion in *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994). In that case, the Fifth Circuit flatly held that "'[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones.'" 28 F.3d at 451-52 (quoting *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993)).[20] To date, *Garcia* is the only reported appellate opinion to directly address this issue.

In reaching its conclusion in *Garcia*, the Fifth Circuit cited and apparently relied on *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Goluszek, a male, sued his former employer under Title VII, alleging that he had been the victim of sexual harassment by several of his male co-workers and that his employer had failed to remedy and control the situation after Goluszek had made repeated complaints. 697 F. Supp. at 1453-55. Although the Court in *Goluszek* recognized that "a wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim," the Court refused to do so and instead "adopt[ed] a reading of Title VII consistent with the underlying concerns of Congress." 697 F. Supp. at 1456. Elaborating, the Court said:

---

advances, like unwelcome heterosexual advances, are actionable under Title VII." *Id.* at 9 n.2. As have a number of commentators over the years, the Court in *Parrish* accepted without extensive scrutiny the rationale of both *Joyner* and *Wright* that "[i]f a plaintiff complains of unwanted homosexual advances, the offending conduct is based on the employer's sexual preference and necessarily involved the plaintiff's gender, for an employee of the non-preferred gender would not inspire the same treatment." Id.; *see e.g.*, S. Estrich, *Sex at Work*, 1991 Stanford L. Rev. 813, 819 & n.18; K. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 1987 Colum. L. Rev. 1258, 1259 n.13.

[20] The Fifth Circuit's opinion in *Giddens* was not published and is not available from any electronic database or other service.

> Simply stated, the defendant's conduct was not the type of conduct Congress intended to sanction when it enacted Title VII. The goal of Title VII is equal employment opportunity. That goal is accomplished in part by imposing an affirmative duty on employers to maintain a working environment free of discriminatory intimidation. The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their [sic] sexuality. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex.
>
> During the times relevant to his claim, Goluszek was a male in a male-dominated environment. . . . The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.

697 F. Supp. at 1456 (cits. omitted).

Since the Fifth Circuit rendered its opinion in *Garcia*, only one other federal court has addressed the issue of Title VII's applicability to same-gender sexual harassment. In *Vandeventer v. Wabash Nat'l Corp.*, 1994 U.S. Dist. LEXIS 16454 (N.D. Ind. Oct. 17, 1994). Chief District Judge Allen Sharp followed *Garcia* and

Goluszek and dismissed a plaintiff's Title VII claims of sexual harassment on the ground that "[s]ame-sex harassment is not actionable under Title VII." *Vandeventer*, *supra* at 17-19. Chief Judge Sharp expressed his "agree[ment] with the *Goluszek* analysis that Title VII is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender." *Id.*

Following its review of the pertinent authorities discussed herein above, this Court has concluded that it will follow and apply in this case the reasoning of the Fifth Circuit in *Garcia* and that of two different district courts in *Vandeventer* and *Goluszek*. Accordingly, this Court holds that Title VII does not provide a cause of action for an employee who claims to have been the victim of sexual harassment by a supervisor or co-worker of the same gender. Title VII prohibits discriminatory conduct on the basis of gender and "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'" *Vinson*, 477 U.S. at 64 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 707 n.13 (1978)) (emphasis added). Where, as here, the alleged harasser and the alleged victim are both of the same gender, the language of the statute would be strained beyond its manifest intent were the Court to hold that under these facts there has been discrimination "because of . . . sex".[21]

For all these reasons, this Court concludes that plaintiff has failed to state in this case a viable claim of sex discrimination, and that defendant is entitled to summary judgment in its favor as to that claim.

Alternatively, even assuming that Title VII's prohibition of sex discrimination encompasses same-gender sexual harassment, this

---

[21] Plaintiff has not here argued that Title VII should encompass same-gender sexual harassment because that statute encompasses Title VII context. *See* J. Thorpe, Note, *Gender-Based Harassment*, 1990 Duke L.J. 1361, 1378 n.80.

Court finds and concludes that plaintiff has on the present record failed to establish that he was discriminated against "because of" "same-race racial harassment." This court is satisfied that "racial harassment" is not a proper analogy for "sexual harassment" in the his sex. That the harassment complained of occurred "because of" the plaintiff's sex is an indispensable element of a claim under Title VII. *See Swentek v. USAIR. Inc.*, 830 F.2d 552, 557 (4th Cir. 1987); *Henson v. Dundee*, 682 F.2d 897, 903-04 (llth Cir. 1982) (collecting cases); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993).

In *Polly*, a case which was decided before *Garcia*, the Court noted that "[t]he question of Title VII's applicability to sexual harassment of one by another of the same sex appears to be one of first impression in this circuit." 825 F. Supp. at 136.[22] Although the Court stated that "the majority of courts considering the issue have refused to limit Title VII's application to harassment of a female by a male," id. 136-37 (citing Joyner and *Wright*), the Court ultimately concluded that the issue need not be decided, "because, assuming without deciding, that Title VII does apply to sexual harassment of a male by his male co-workers, [the plaintiff] has failed to produce summary judgment evidence sufficient to raise a fact issue on the existence of an essential element of his Title VII [claim]." *Id.* at 137. Specifically, the Court held that the plaintiff had "not shown that, *but for* his being male, he would not have been treated by his co-workers in the manner that he was." *Id.* at 138 (emphasis in original)

The analysis made by the Court in *Polly* is equally applicable here. Plaintiff has neither alleged nor argued that he was treated differently from other BG&E employees of *either* gender. To the contrary, the record here indicates that Swadow was crude,

---

[22] Presumably, the *Polly* court would now be bound by *Garcia*, since that court is within the Fifth Circuit.

insensitive and offensive to all of his employees, as well as to other persons not employed by BG&E. Evidence exists that Swadow had earlier subjected a female to sexual harassment. The theory advanced by plaintiff here is that Swadow, a married man with children, was bi-sexual. None of the alleged incidents of sexual harassment by Swadow involved implicit or explicit requests or demands for sexual favors. Indeed, many of the incidents relied upon do not appear at all to have even been "sexual" in nature, and several others involved essentially trivial conduct which would not in any event be actionable under Title VII. According to plaintiff's own deposition testimony, Swadow never asked that plaintiff go out with him on a "date," and Swadow never touched plaintiff in a sexual manner.

This Court has concluded that no reasonable juror could find on the present record that Swadow singled out and targeted plaintiff for harassment on account of plaintiff's sex. For this reason also, defendant's motion for summary judgment will be granted as to plaintiff's claim of sex discrimination.[23]

(b)

Retaliation

Plaintiff has also asserted in this case a claim of retaliation. Plaintiff's failure to make out a successful sexual harassment claim does not necessarily prevent him from prevailing on a claim of retaliation based on a complaint of harassment. *Kidwai v.*

---

[23] Other questions which arise on the record here are whether the alleged harassing acts were sufficiently pervasive and continuous to create an abusive working environment, whether they were too isolated and trivial to be actionable, whether defendant BG&E took effective action to correct the situation once it was brought to the attention of management, and whether plaintiff's claims asserted under Title VII are barred in whole or in part by limitations. In view of the Court's rulings on the other issues presented, it is not necessary to address these additional questions.

McDonald's Corp., 1994 U.S. App. LEXIS 7799, at 11 (4th Cir. Apr. 18, 1994); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 357 n.1 (4th Cir. 1985) ("[a]n underlying discrimination charge need not be meritorious for a plaintiff to prevail on a claim of retaliation"). In order to make out a *prima facie* claim of retaliation, plaintiff must show: (1) that he engaged in protected activity; (2) that his employer took adverse employment action against him; and (3) that there was a sufficient causal connection between the protected activity and the adverse employment action. *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Maqnuson v. Peak Tech. Services*, 808 F. Supp. 500, 515 (E.D. Va. 1992).

Applying these principles to the facts of record here, this Court has concluded that plaintiff has failed to make out a *prima facie* claim of unlawful retaliation under Title VII. Specifically, plaintiff has failed to show that defendant BG&E took any adverse employment action against him. Plaintiff's principal contention is that BG&E discharged him on October 19, 1993 in retaliation for his repeated complaints concerning Swadow's alleged harassment and for his filing of a Charge with the EEOC. However, the entire Photographic Services Unit was abolished in October of 1993 as a part of a reduction in its work force undertaken by BG&E. The positions of both Swadow and plaintiff were eliminated. Nevertheless, plaintiff was not discharged at the time. He received full salary and benefits until January of 1994 and could have continued his employment thereafter. Instead, on January 31, 1994, plaintiff chose to voluntarily terminate his employment.

According to the affidavit of Linda Miller, Manager of Employee Services for BG&E, plaintiff could have continued to participate in the Transition Center program, with continued full salary and benefits plus tuition reimbursement for up to 26 weeks following January 1, 1994, or until he secured another position with BG&E, which ever occurred first. Instead, as revealed by

Miller's affidavit, plaintiff *voluntarily* chose, effective January 31, 1994, to receive a lump sum payment equivalent to thirty weeks salary in lieu of his continued participation in the Transition Center program. Although he has had ample opportunity to do so, plaintiff has not disputed or otherwise responded to these facts established by the record here.[24] At the time of the filing of this suit by plaintiff on December 23, 1993, plaintiff's employment with BG&E had not as yet been terminated. Plaintiff's subsequent, voluntary decision to discontinue his participation in BG&E's Transition Center program cannot give rise to a viable claim of retaliatory discharge under Title VII. *See Diamond v. T. Rowe Price Assoc. Inc.*, 852 F. Supp. 372, 397 (D. Md. 1994).

Faced with an inability to rely on his alleged discharge to support his claim of retaliation, plaintiff has argued in his opposition to the pending motion that the various other instances of allegedly retaliatory conduct described herein above provide an alternative basis for his claim of retaliation. There is no merit to this contention. Plaintiff has failed to show that any of the allegedly retaliatory acts of Swadow or of other BG&E officials were "adverse employment actions" undertaken in retaliation for protected activity. As this Court has previously recognized, the term "adverse employment action" refers in this context to "'ultimate employment decisions,' not 'interlocutory or mediate decisions having no effect upon employment conditions.'" *Raley v. Board of St. Mary's County Comm'rs*, 752 F. Supp. 1272, 1281 (D. Md. 1990) (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981)).

As indicated herein above, plaintiff was not discharged from his employment. Nor has he been able to point to any facts in the record which support his contention that he was subjected to some other "adverse employment action." The Formal Warning was just

---

[24] Nor has there been any allegation or contention here by plaintiff that he was constructively discharged by BG&E.

that, a warning, and in any event was eventually removed from plaintiff's-personnel record. Here, as in *Raley*, "[t]he touchings and verbal comments [complained of by plaintiff) were not employment decisions." L at 1278. Moreover, "[m]any of [plaintiff]'s allegations can be attributed to an increase of predictable tension in an office after a discrimination charge is filed. This is not adverse employment action." *Id.* at 1281 (citing *Geisler v. Folsom*, 735 F.2d 991, 994 (6th Cir. 1984)). On the record here, this Court is satisfied that no reasonable jury could find on these facts that any adverse employment action was taken against plaintiff by Swadow or by any other BG&E official in retaliation for his complaints about Swadow's alleged sexual harassment. Plaintiff has accordingly not met his burden of proving a *prima facie* case of retaliation under Title VII.

Accordingly, defendant's motion for summary judgment will be granted as to all of plaintiff's claims . An appropriate Order will be entered by the Court.

Alexander Harvey II

Senior United States District Judge

DATED: *December 28, 1994*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE E. HOPKINS, JR.	*	
Plaintiff	*	
vs.	*	
	*	CIVIL NO. H-93-4167
BALTIMORE GAS &	*	
ELECTRIC COMPANY	*	
Defendant	*	

* * * o0o * * *

ORDER

For the reasons stated in the Opinion of the Court filed today, it is this 28th day of December, 1994 by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion for summary judgment be and the same is hereby granted; and

2. That judgment is hereby entered in favor of defendant, with costs.

Alexander Harvey II

Senior United States District Judge

No. 95-209
CA-93-4167-H

GEORGE E. HOPKINS, JR.
Plaintiff-Appellant

v.

BALTIMORE GAS AND ELECTRIC COMPANY
Defendant-Appellee

AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, INC.; WOMEN'S LEGAL DEFENSE FUND; NATIONAL WOMEN'S LAW CENTER; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Amici Curiae

ORDER

Appellant has filed an untimely petition for rehearing and suggestion for rehearing in banc. This Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing in banc.

The Court denies the petition for rehearing and suggestion for rehearing in banc as untimely filed.

For the Court - By Direction

/s/ Bert M. Montague
Clerk

EQUAL EMPLOYMENT OPPORTUNITIES
42 USCS § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29 CFR Ch. XIV (7-1-91 Edition)

Equal Employment Opportunity Comm. Pt. 1604, App.

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an Individual's [1]

---

[1] The principles involved here continue to apply to race, color, religion or national origin.

work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.